

THE
INDIAN LIMITATION ACT
(IX OF 1908)

WITH
EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

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VOLUME III
THE FIRST SCHEDULE
ARTICLES 141 TO 183
APPENDIX AND
GENERAL INDEX



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ABBREVIATIONS

A I R. 1921 All., Bom., etc.	... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
All.	... Allahabad (I. L. R.)
Agra	... Agra High Court Reports.
All L. Jour.	... Allahabad Law Journal.
All W. N.	... Allahabad Weekly Notes.
Beng. L. R.	... Bengal Law Reports.
Bom.	... Bombay (I. L. R.).
Bom. H. C. R.	... Bombay High Court Reports.
Bom. L. R.	... Bombay Law Reporter.
Bom. P. J.	... Bombay Printed Judgments.
Bourke.	... Bourke's Reports.
Bur. L. Jour.	... Burma Law Journal.
Bur. L. R.	... Burma Law Reports.
Bur. L. Tim.	... Burma Law Times.
Cal.	... Calcutta (I. L. R.).
Cal. L. Jour.	... Calcutta Law Journal.
Cal. L. R.	... Calcutta Law Reports.
Cal. W. N.	... Calcutta Weekly Notes.
C. P. L. R.	... Central Provinces Law Reports.
Cor.	... Coryton's Reports.
Cr. C.	... Criminal Cases.
Cr. L. J.	... Criminal Law Journal.
E. R.	... English Reports.
Hay.	... Hay's Reports.
Hyde.	... Hyde's Reports.
Ind. App.	... Law Reports, Indian Appeals.
Ind. Cas.	... Indian Cases.
Ind. Jur. (N.S.)	... Indian Jurist (New Series).
Ind. Jur. (O.S.)	... Indian Jurist (Old Series).
Ind. Rul.	... Indian Rulings.
Knapp.	... Knapp's Reports.
Lah.	... Lahore (I. L. R.).
Lah. L. Jour.	... Lahore Law Journal.
L. R. A.	... Law Reporter, Allahabad.
Low. Bur. Rul.	... Lower Burma Rulings.
Luck.	... Lucknow (I. L. R.).
L. C.	... Lucknow Cases.
Mad.	... Madras (I. L. R.).
Mad. H. C. R.	... Madras High Court Reports.
Mad. Jur.	... Madras Jurist.
Mad. L. Jour.	... Madras Law Journal.
Mad. L. Tim.	... Madras Law Times.
Mad. L. W.	... Madras Law Weekly.
Mad. W. N.	... Madras Weekly Notes.
Marsh.	... Marshall's Reports.
Moo. Ind. App.	... Moore's Indian Appeals.

Moo. P. C. C.	... Moore's Privy Council Cases.
Nag. L. Jour.	... Nagpur Law Journal.
Nag. L. R.	... Nagpur Law Reports.
N.-W. P. H. C. R.	... North-West Provinces High Court Reports.
Oudh Cas.	... Oudh Cases.
Oudh L. Jour.	... Oudh Law Journal.
Oudh W. N.	... Oudh Weekly Notes.
Pat.	... Patna (I. L. R.).
Pat. H. C. C.	... Patna High Court Cases.
Pat. L. Jour.	... Patna Law Journal.
Pat. L. R.	... Patna Law Reporter.
Pat. L. Tim.	... Patna Law Times.
Pat. L. W.	... Patna Law Weekly.
Pun. L. R.	... Punjab Law Reporter.
Pun. Re.	... Punjab Record.
Pun. W. R.	... Punjab Weekly Reporter.
R. & J.'s.	... Rafique and Jackson's Oudh Privy Council Decisions.
Rang.	... Rangoon (I. L. R.).
R. R.	... Revised Reports.
R S. C.	... Rules of the Supreme Court of England.
Sar.	... Saraswati's Privy Council Judgments.
Shome L. R.	... Shome's Law Reports.
Sind L. R.	... Sind Law Reporter.
Suther.	... Sutherland's Privy Council Judgments.
Suth. W. R.	... Sutherland's Weekly Reporter.
Times L. R.	... Times Law Reports.
U. P. L. R.	... United Provinces Law Reports.
U. P. B. R.	... United Provinces Board of Revenue.
Upp. Bur. Rul.	... Upper Burma Rulings.
Weir.	... Weir's Criminal Rulings.
W. R. (Eng.)	... Weekly Reporter (England).
<hr/>	
C. A.	... Court of Appeal.
Cl.	... Clause.
Cr.	... Criminal.
F. B.	... Full Bench.
F.-N.	... Foot-Note.
Jour.	... Journal.
N.	... Note.
O.	... Order.
P.	... Page.
P. C.	... Privy Council.
Pt.	... Point.
R.	... Rule.
S.	... Section.
S. B.	... Special Bench.

THE INDIAN LIMITATION ACT

ACT IX of 1908

Volume III.

THE FIRST SCHEDULE

FIRST DIVISION : SUITS (*continued*)

Description of suit.	Period of limitation.	Time from which period begins to run.
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PART VIII.—Twelve Years (continued).

141.* Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female.	Twelve years.	When the female dies.
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Article 141

* Act of 1877
Same as above.

Act of 1871

142.—Like suit by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow.	Twelve years.	When the widow dies.
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Act of 1859

No corresponding provision.

Article 141

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Like suit."
4. "By a Hindu or Muhammadan."
5. "Entitled" means entitled independently of the right of the female.
6. Plaintiff must be entitled to the possession on the death of the female.
7. "On the death of a Hindu or Muhammadan female."
 8. Suit by a transferee from a Hindu or Muhammadan entitled etc.
 9. Death, if includes civil death—Effect of surrender by female or re-marriage of widow.
 10. "Hindu or Muhammadan female."
11. "Immoveable property."
12. Suit contemplated is one against a person in possession.
 13. Adverse possession against female—Effect of.
 14. Adverse possession against last male owner.
 15. Alienation or arrangement entered into by female.
 - 15a. Limited owner setting up full title.
16. Suit involving declaration as to adoption by Hindu female.
17. Suit for possession on ground of mistake.
18. Suit for redemption of mortgage made by last male owner where mortgagee has, during widow's lifetime, transferred it to third party.
19. Section 6 and this Article.
20. Onus of proof.
21. Starting point.
22. Local and special law.

Other Topics

Applicability of Article—Essentials	...	...	See Note 2, Pt. 8
Article 125 and this Article—Remedies under, are not mutually exclusive ...			
Article 134 and this Article	...	...	See Note 12, Pts 3 to 6
Articles 118, 119 and this Article	...	...	See Note 18
Females inheriting more than one—Starting point	...	...	See Note 16
			See Note 21, Pt. 4

1. Legislative changes.

1 There was no Article corresponding to this in the Act of 1859.
A suit for possession had, in all cases, to be filed within twelve
years of the date when the *cause of action* arose.

2 Article 142 of the Act of 1871 provided that a suit for possession of immovable property by a *Hindu* entitled to the possession of immovable property on the death of a *Hindu widow* should be brought within a period of twelve years from the time when the widow died.

3. Article 141 of the Act of 1877 enlarged the provision in Article 142 of the Act of 1871 so as to cover a suit by a Muhammadan, and the words "Hindu widow" were substituted by the words "Hindu or Muhammadan female." As to the reason of the addition of the word "Muhammadan" see Note 5 to Article 125 *ante* where also the word "Muhammadan" was added.

4. The Article has been retained in the same form in the present Act.

See the undermentioned cases where the history of the Article has been traced ¹

2. **Scope of the Article.**—This Article applies to a suit by a Hindu or a Muhammadan for possession of immovable property where such Hindu or Muhammadan has become entitled to such possession *on the death* of a Hindu or a Muhammadan female. It is restricted to suits by a plaintiff whose title and right, as the heir of the last full owner, to sue for possession, accrues upon the death of a female holding a woman's qualified estate under the Hindu or Muhammadan law.^{1a} Thus a Hindu reversioner would become entitled to the possession of immovable property belonging to the last male owner only on the death of the Hindu female who has succeeded to the last male owner. It is only then that the succession opens out to

Article 141 — Note 1

1 6 Ind App 267 : 117 Ind
801 : 51 All 188 (F B).

(1830) 13 Mad 512 (514, 515), *Sambasita v. Ragava*.

(1915) A I R 1915 Mad 539 (540) : 25 Ind Cas 692, *Venkataram v. Venkataramiah*.

(1918) A I R 1918 Mad 756 (757) . 42 Ind Cas 228, *Ramachandra Reddi v. Audemba*

(1929) A I R 1929 Mad 421 (423, 424, 425) : 119 Ind Cas 57, *Ayyaswami Avvar v. Mahadeva Avvar*.

(1916) A I R 1916 Oudh 50 (53, 54) : 18 Oudh Cas 289 : 33 Ind Cas 371,
Ghiso Singh v. Gajraj Singh.

Note 2

1a (1924) A I R 1924 Pat 721 (728) : 3 Pat 860 : 83 Ind Cas 812, *Keshav Prasad Singh v. Madho Prasad Singh*.

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1—2

Article 141

Note 2

him and he becomes entitled to get possession of the property.¹ His cause of action, in fact, is the death of the female.² A suit by him for possession would lie only after the death of the female and not before.³ Such a suit would be governed by this Article.⁴ Similarly, certain classes of Muhammadans, such as the Khojas, Cutchi Memons and Halai Memons, follow the Hindu law with regard to the succession of females and the nature of the estate inherited by them.⁵

1. (1938) A I R 1938 P C 254 (256) : 177 Ind Cas 1 (P C), *Rajlakshmi Dassi v. Bholanath Sen*.

2. (1925) A I R 1925 P C 127 (129) : 21 Nag L R 127 : 88 Ind Cas 343 (P C), *Harigir Kisanvir v. Anand Dharathi*. (Reversioner's title accrues only on death of widow.)

(1878) 4 Cal 523 (526) : 3 Cal L R 391, *Prosonna Nath Roy v. Afsolonnessa Begum*.

(1901) 1901 All W N 62 (63), *Shahadat Chaudhri v. Bhagwati Prasad*.

(1936) A I R 1936 Pesh 119 (125), *Ahmad Khan v. Mt. Hayat Bibi*.

(1897) 19 All 357 (371) : 1897 All W N 80, *Hanuman Prasad Singh v. Bhagauti Prasad*.

(1890) 14 Bom 482 (489), *Cursandas Govindji v. Fundraias Purshotam*.

(1864) 1 Suth W R 347 (348), *Woomachurn Banerjee v. Haradhun Mozoomdar*.

(1865) 2 Suth W R 197 (200), *Chundro Seehur Roy v. Nobin Soondur Roy*.

(1867) 8 Suth W R 519 (522, 523), *Ram Sheruk Roy v. Sheo Govind Sahoo*.

(1868) 10 Suth W R 276 (277), *Suntokhee Thakoor v. Mt. Balase Koonwur*.

(1869) 11 Suth W R 183 (184) : 2 Beng L R App 39, *Gopal Mullick v. Onoop Chunder Roy*.

(1882) 10 Cal L R 337 (345), *Sheo Narain Singh v. Khurgo Koerry*.

(1879) 1879 Pun Re No. 15, *Mt. Jai Devi v. Shib Dayal*.

(1898) 1898 Pun Re No. 79, *Chiragha v. Maktaba*.

(1912) 1912 Pun L R No. 198, *Kesho Das v. Nathu Mal*.

(1915) A I R 1915 Lah 353 (354) : 27 Ind Cas 699, *Hakam Singh v. Inder*.

(1918) A I R 1918 Mad 659 (660) : 42 Ind Cas 540, *Venkatramanayya v. ...*

...muga Velayudham

... Ind Cas 44, Wasudeo

v. Bhira.

(1919) A I R 1919 Oudh 213 (214) : 22 Oudh Cas 156 : 52 Ind Cas 845, *Achhabar Singh v. Hargobind Singh*.

(1925) A I R 1925 Oudh 164 (166) : 78 Ind Cas 65, *Raj Dulari v. Chandesar Dei*.

(1933) A I R 1933 Oudh 170 (172) : 8 Luck 538 : 150 Ind Cas 346, *Rajeshwar Bali v. Harkishen Bali*.

(1911) 10 Ind Cas 387 (388) : 1911 Pun Re No. 32, *Kahre Khan v. Ghulam Ghouse*.

3. (1890) 14 Bom 482 (489), *Cursandas Govindji v. Fundraias Purshotam*.

... Nauth.

4. (1912) 14 Ind Cas 71 (72) : 1912 Pun Re No. 52, *Nur Ahmad v. Rahim Bakhsh*.

(1907) 6 Cal L Jour 490 (522), *Roy Radha Kissen v. Nauratan Lall*.

(1892) 1892 Pun Re No. 141, *Budda v. Khan*.

... Prasad.

5. (1922) A I R 1922 P C 414 (415) : 47 Bom 146 : 50 Ind App 103 : 72 Ind Cas 202 (P C), *Khatubai v. Md. Hajee Abu*.

A suit by a Muhammadan entitled to succeed to another Muhammadan on the death of a female when such female is by such custom entitled only to a limited estate, would be governed by this Article.⁶

Since the cause of action is the death of the female, the third column of the Article provides that time will begin to run from such death. This is in accordance with the general principle of the law of limitation that a person can only be considered to be barred, if he has a right and does not exercise that right within the period prescribed, the maxim being *contra non valentem agere nulla currit prescriptio* — Prescription does not run against a party under disability or who is unable to act.⁷

In order to claim the benefit of the Article the plaintiff must prove *firstly*, that there was a qualified estate in a Hindu or a Muhammadan female, *secondly*, that he was entitled to possession after her death as the heir of the last male holder, and *thirdly*, having regard to the existing law, he was entitled to possession on the date of the suit.⁸

3. "Like suit." — These words show that this Article is to be read along with Article 140¹ and, so read, they mean a suit for possession of immovable property.² They cannot be taken to imply that the suit must be in respect of an estate created in the same way as the estate upon which the estate in remainder or reversion contemplated by Article 140 leans, that is to say, by grant or devise or that it must be an estate characterized by the same incidents which attach to such a particular estate.³ As has been seen in the Notes to Article 140 *ante*, the words "reversioner" and "remainderman" in that Article have been used in the technical and strict sense in which they are used in English law and do not include a person like a Hindu reversioner who has only a possibility of reverter to the estate.⁴ In the latter case this Article would apply.⁵

But the principle underlying the two Articles is the same, namely that time runs when the estate opens out for the benefit of the plaintiff, whether he is a remainderman or reversioner in the strict

6. (1930) A I R 1930 P C 85 (36, 88) : 121 Ind Cas 517 : 57 Ind App 29 : 5 Luck 70 (P C), *Roshan Ali Khan v. Ashgar Ali*.

(1930) A I R 1930 Lah 111 (112) : 125 Ind Cas 52, *Lehna v. Nur Ahmad*.

7. (1928) A I R 1928 Oudh 155 (189, 190) : 108 Ind Cas 817, *Abdul Halim Khan v. Saadat Ali Khan*.

8. (1924) A I R 1924 Pat 721 (728) : 3 Pat 880 : 83 Ind Cas 812, *Kesho Prasad Singh v. Madho Prasad Singh*.

Note 3

1. (1918) A I R 1918 Oudh 82 (53) : 44 Ind Cas 368 : 21 Oudh Cas 1, *Bisheshwar Baksh Singh v. Rameshwar Baksh Singh*.

2. (1921) 64 Ind Cas 462 (464) (All), *Jagrani Misran v. Shoo Dulari*.

3. (1916) A I R 1916 Oudh 50 (54) : 18 Oudh Cas 289 : 33 Ind Cas 371, *Ghisa Singh v. Gajraj Singh*.

4. (1924) A I R 1924 Pat 721 (727, 728) : 3 Pat 880 : 83 Ind Cas 812, *Keshav Prasad Singh v. Madho Prasad Singh*.

5. (1895) 8 C P L R 102 (105), *Nilkantrao v. Tularam*.

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sense in which the expression is used in English law or whether he is a person who succeeds upon the cessation of the peculiar limited estate under the Hindu law. This Article may, in this sense, be said to be an extension of Article 140 with special reference to persons succeeding to an estate upon the cessation of the peculiar estate of a limited owner under the Hindu law.⁶

A suit for a *declaration* of right to property⁷ or for the construction of a will or codicil^{7a} is not within this Article. Such a suit filed *before* the death of the female is not within this Article, because the plaintiff would not then be entitled to possession of the property. Nor will such a suit lie at all *after* the death of the female inasmuch as the plaintiff, being entitled to the further relief of possession, would be barred by the Proviso to Section 42 of the Specific Relief Act, 1877, from filing a suit for a mere declaration of right.

4. "By a Hindu or Muhammadan." — It has been seen in Note 5 to Article 125 *ante*, which is in *pari materia* with this Article, that the words "by a Hindu or Muhammadan, etc." in that Article refer to cases in which the claim of the Hindu or Muhammadan is based upon his right as a *Hindu or Muhammadan*, that is, to cases where the right arises under the personal law of the parties. It has also been seen in Note 2 to Articles 128 and 129 *ante* that those Articles apply only where the right is claimed, not on the basis of contract, but *on the basis of status of the plaintiff under the Hindu law*. The same principle of interpretation must, it is conceived, be adopted in this Article also. It has accordingly been held by the Chief Court of the Punjab in *Baldeo Singh v. Mohan Singh*,¹ that the Article did not apply where A, B and C entered into a *compromise* by which they left certain property to D, a Hindu widow (who was not entitled to it as heir), after whose death it was to revert to them, and A, after D's death, sued for possession of his share of the property. Their Lordships observed that the Article applied only to cases where a female had succeeded as *heir* and not by *favour* or in some other capacity. In *Bibi Sahodra v. Rai Jang Bahadur*,² a case decided by the Privy Council in 1881, certain properties had been given to a Hindu widow by a *compromise decree* to belong to her for life and to revert to A after her death. A's heirs instituted a suit for possession of the property within twelve years of the death of the widow but beyond twelve years of the alienation which had been made by her in breach of a

6. (1916) A I R 1916 Bom 300 (801) : 40 Bom 239 : 33 Ind Cas 484, *Jayavant Jwan Rao v. Ramchandra Narayan*

7. (1930) A I R 1930 Bom 545 (546) : 54 Bom 837 : 127 Ind Cas 897, *Shankar-bhai Dajibhai v. Bai Shiv.*

(1936) A I R 1936 Lah 835 (836) : 165 Ind Cas 149, *Ishar Das v. Ghulam Mohammad.*

7a (1893) 20 Cal 906 (924, 925), *Chulkkun Lal Roy v. Lolit Mohan Roy.*

Note 4

1. (1914) A I R 1914 Lah 458 (459, 460) : 22 Ind Cas 855.

2. (1881) 8 Cal 224 (229) : 8 Ind App 210 : 6 Ind Jur 108 : 4 Sar 294 (P C).

condition against alienation. It was held by their Lordships of the Privy Council that Articles 142 and 143 of the Act did not apply to the case, but that the suit was within time as the possession of the alienee was not "adverse" to A until the widow's death. Their Lordships did not refer to Article 141, nor was the Article cited at the Bar. The discussion of the question when the possession became *adverse* makes it clear that their Lordships dealt with the case as one coming under Article 144 and not Article 141. See also the undermentioned case.³

It has however been held in several decisions that this Article applies to cases where the female was in possession not as an heir under the Hindu law but under an agreement,⁴ or an award,⁵ or by virtue of having acquired a limited estate by adverse possession,⁶ or by custom,⁷ or in some other way.^{7a} But an examination of the cases will show that the question whether the Article applies to cases where the plaintiff's title is otherwise than under the *personal* law of the parties, was not specifically raised or dealt with. It is submitted that they cannot be accepted as correct in this respect.

The "Hindu or Muhammadan" contemplated by this Article may be a *male or a female*. Thus, a daughter succeeding to a widow must sue for possession within 12 years of the widow's death.⁸ Similarly,

3. (1927) A I R 1927 Nag 226 (228) : 101 Ind Cas 622, *Deoram Gujar v. Biju Gujar*. (Co-widow in possession of property for life under compromise — Alienation by her — Suit by the other widow after death of the co-widow for possession — Possession regarded *adverse* only from death — Article 141 was not referred to — Article 144 must be taken to have been applied.)
4. (1937) A I R 1937 All 189 (189, 189) : 167 Ind Cas 527, *Sarju Bai v. Chairman, Municipal Board, Jhansi*. (After mother of last male owner, grandmother was the heir, but under an agreement the sister was entitled to take the estate — Held Article 141 applied)
- (1934) A I R 1934 Bom 110 (112) : 58 Bom 280 : 149 Ind Cas 674, *Bhagirthis-bai v. Appa Dada*.
- (1935) A I R 1935 Cal 702 (704) : 159 Ind Cas 1101, *Hemendra Nath Roy v. Jnanendra Prasanna*.
5. (1894) 8 C P L R 102 (104, 105), *Nilkantrao v. Tukaram*. (Settlement award)
- (1937) A I R 1937 All 268 (270) : I L R (1937) All 424 : 169 Ind Cas 586, *Rashik Lal Chauhan v. Mt. Radha Dhulayya*.
6. (1934) A I R 1934 Oudh 190 (194) : 150 Ind Cas 495 : 9 Luck 484, *Gaya Bakhsh Singh v. Deo Singh*.
7. (1912) 14 Ind Cas 71 (72) : 1912 Pun Re No 52, *Nur Ahmad v. Rahim Bakhsh*.
- (1907) 1907 Pun Re No. 145 . 1907 Pun W R No 185, *Miran Bakhsh v. Ahmad*.
- (1892) 1892 Pun Re No. 31 (F B), *Budhe Khan v. Makhe Khan*.
- (1919) A I R 1919 Lah 448 (449) : 1918 Pun Re No. 95 : 47 Ind Cas 977, *Ganesh Ram v. Panju Singh*.
- (1914) A I R 1914 Lah 452 (453) : 1914 Pun Re No. 29 : 24 Ind Cas 212, *Bhagat Singh v. Sher Singh*.
- (1937) A I R 1937 Oudh 4 (9) : 12 Luck 592 : 165 Ind Cas 322, *Irshadulla Khan v. Mt. Fakhira Begum*.
- 7a. (1920) A I R 1920 O 24 281 (284), *Mad. Prasad v. Mt. Fakhira Khan*. (Life

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it was held that a suit by a sister of the last male owner who succeeded after his mother was governed by this Article.⁹

5. "Entitled" means entitled independently of the right of the female.—The word "entitled" must be understood as meaning "entitled *independently of the right* of the Hindu or Muhammadan female."¹ A Hindu reversioner, for example, becomes entitled to the property as succeeding to the *last male owner* and not to the widow and is therefore a person "entitled to the possession of the property on the death of the Hindu female" within this Article. But the *heir* of a Hindu or Muhammadan female who is a *full owner* of the property is not a person entitled to the property *independently of the right of the female*, but merely derives his right through her. A suit by such heir for possession of the property inherited by him from the female is, therefore, not one governed by this Article.²

6. Plaintiff must be entitled to possession on the death of the female.—This Article does not apply unless the plaintiff became entitled to possession immediately on the death of the female. Where a Hindu female alienates property by a usufructuary mortgage for necessity, the reversioner would not be entitled to the possession thereof immediately on the death of the female. He would be entitled to it only *after redemption*. A suit, therefore, by the reversioner for possession only, without asking for redemption is not maintainable nor is it governed by Article 141.¹ A suit for redemption would not also be barred under this Article, even though it was filed more than twelve years after the death of the female.² Where a widow has validly let out the property to a tenant-at-will and the reversioner sues for possession after the death of the widow, this

(1916) A I R 1916 All 47 (48) : 33 All 117 : 33 Ind Cas 127, *Ramsingh v. Mt. Bhani*.

9. (1937) A I R 1937 All 188 (189) : 167 Ind Cas 527, *Sarju Bai v. Chairman, Municipal Board, Jhansi*.

Note 5

1. (1916) A I R 1916 Oudh 50 (54) : 18 Oudh Cas 289 : 33 Ind Cas 371, *Ghisa Singh v. Gajraj Singh*.

(1918) A I R 1918 Oudh 82 (53) : 21 Oudh Cas 1 : 44 Ind Cas 368, *Bisheshar Baksh Singh v. Rameshar Bakhsh Singh*.

(1923) A I R 1923 Oudh 185 (201) : 26 Oudh Cas 133 : 75 Ind Cas 626, *Zarif-un-Nissa v. Shafig-uz-Zaman*

2. (1888) 10 All 313 (316) : 1888 All W N 38, *Hashmat Begam v. Mazhar Hussain*.

(1916) A I R 1916 Oudh 50 (54) : 18 Oudh Cas 289 : 33 Ind Cas 371, *Ghisa Singh v. Gajraj Singh*.

us 368, *Bisheshar*

id Cas 626, *Zarif-*

153, *Malkarjun*

Note 6

1. (1913) 18 Ind Cas 811 (813) (All), *Ganga Saha v. Kanhaiya Lal*.

2. (1888) 1888 Pun Re No. 10, *Duta Singh v. Jhagra*.

Article will not apply and time will not run from the death of the widow but from the expiry of the tenancy.³

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7. "On the death of a Hindu or Muhammadan female." — The plaintiff must be a person who becomes "entitled" in the sense explained in Note 5 *ante*, on the death of a Hindu or Muhammadan female. A son adopted by a Hindu widow becomes, under the Hindu law, entitled to the property inherited by the adoptive mother, *immediately on adoption* and not *on her death*; consequently, a suit by such adopted son for possession of the property so got by him is not one within this Article.¹ A son adopted by the *last male owner himself* is entitled to the possession of his property immediately on the death of such owner and not on the death of his widow, and a suit by him for possession would be governed not by this Article but by Article 144, and would be barred after twelve years of the owner's death.²

Where a Hindu widow makes an alienation of her husband's property and subsequently adopts a son to him, the alienation, if it has not been made for necessity, is not binding on the adopted son who can immediately on adoption sue for recovery of such property. The alienation is not good till the lifetime of the adoptive mother so as to enable the adopted son to take advantage of this Article and file a suit within twelve years of her death.³

It may also be stated here that even adverse possession against a widow is not adverse to the son adopted by her subsequently. Possession can be adverse to him only from the date of his adoption.⁴ Where *A* and *B*, daughters of *X*, succeed to *X* jointly and subsequently *A* dies, *B* gets the property by *survivorship* and cannot be

3. (1907) 1907 Pun L R No. 91 : 1906 Pun Re No. 90 : 1906 Pun W R No. 137, *Ghudu Singh v. Khushal Singh*

Note 7

1. (1918) A I R 1918 Mad 469 (472) : 41 Mad 75 : 42 Ind Cas 245 (F B), *Vaidyanatha Sastri v. Savithri Ammal*. (Overruling 26 Mad 143.)
(1928) A I R 1928 Oudh 155 (194) : 108 Ind Cas 817, *Abdul Halim Khan v. Saadat Ali Khan*.
(1909) 1 Ind Cas 647 (648) : 33 Bom 88, *Ramkrishna v. Tripurabai*.
(1894) 19 Bom 809 (814, 815), *Moro Narayan v. Balaji Raghunath*.
(1905) 9 Cal W N 795 (801) : 2 Cal L Jour 87, *Harek Chand v. Bejoy Chand*.
2. (1904) 1904 Pun Re No. 3 : 1904 Pun L R No. 43, *Ram Narain v. Maharaj Narain*.
3. (1918) A I R 1918 Mad 469 (472) : 41 Mad 75 : 42 Ind Cas 245 (F B), *Vaidyanatha Sastri v. Savithri Ammal*.
(1909) 1 Ind Cas 647 (648) : 33 Bom 88, *Ramkrishna v. Tripurabai*.
[See also (1907) 1907 All W N 148 (149) : 4 All L Jour 354, *Sahdeo Singh v. Ramnandan Singh*.]
4.

- (1900) 2 Bom L R 411 (414), *Hari Vithal v. Waman Hari*. (19 Bom 809, Followed)
(1888) 13 Bom 276 (279), *Krishnaji Janardhan v. Morbhai*.
(1905) 9 Cal W N 795 (801) : 2 Cal L Jour 87, *Harek Chand v. Bejoy Chand*.

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said to become entitled to it *on the death of A*. Where therefore *Y* was in adverse possession of the estate inherited by *A* and *B* for more than twelve years, *Y* would get absolute title to the interests of *A* and *B* in the property under Section 28 and *B* cannot, after *A*'s death, contend that as to *A*'s share she got a fresh right to sue for possession.⁵

8. Suit by a transferee from a Hindu or Muhammadan entitled etc. — It would follow from what has been stated already that a suit for possession by a *transferee* from a Hindu or Muhammadan entitled to the possession of immovable property on the death of a Hindu or Muhammadan female is not one falling within this Article. The transferee would not be entitled by virtue of the personal law governing the parties but by virtue of the right obtained by the *transfer*. The case would be covered by Article 136 *ante* which provides for a suit by a purchaser for possession of property sold when the vendor was out of possession at the date of the sale. The starting point under that Article is the date "when the vendor is first entitled to possession." If the vendor is such a person as is contemplated by Article 141 as a plaintiff, he will become entitled to possession on the death of the female; so that the result will be that even though Article 136 may apply, the starting point will be the death of the female.¹

There have, however, been several cases where this Article has been applied or has been assumed to apply to suits by transferees from reversioners entitled to possession on the death of a Hindu or Muhammadan female.² But the question discussed above was not specifically raised in those cases. They cannot be accepted as correct on principle in this respect.

⁵ (1915) A I R 1915 Cal 234 (234) : 27 Ind Cas 250, *Sachindra Kishore v. Rajani Kanta*.

(1915) A I R 1915 Cal 232 (233) : 27 Ind Cas 83, *Sachindra Kishore v. Rajani Kanta*.

Note 8

¹ (1904) 8 Cal W N 535 (538), *Gadadhar Roy v. Hare Krishna Sarhar*.

(1904) 8 Cal W N 802 (804), *Narmada Deds v. Shoss Bhuvan*.

2. (1912) 14 Ind Cas 71 (72) : 1912 Pun Re No. 52, *Nur Ahmad v. Rahim Baksh*.

(1916) A I R 1916 Mad 709 (710) : 30 Ind Cas 991, *Srinivasa Raya v. Ramappa Hebbara*.

(1898) 20 All 42 (40) : 1897 All W N 105, *...* assumed that Art of other facts by

(1922) A I R 1922 Mac
Ramiah v. Kuru Kotamma. (Do.)

(1915) A I R 1915 Cal 629 (633) : 27 Ind Cas 954, *Mohendra Nath Biswas v. Mt. Shamsunnessa Khatun*. (Do.)

(1920) A I R 1920 Pat 291 (320) : 47 Ind Cas 929, *Sahdeo Naram v. Kusum Kumari*. (Do.)

(1934) A I R 1934 ...

9. Death, if includes civil death—Effect of surrender by female or re-marriage of widow. — It has been held by the Judicial Commissioner's Court of Nagpur¹ and the High Court of Lahore² that the re-marriage of a Hindu widow amounts to her civil death, that Article 141 will cover cases of such civil deaths also and that therefore a suit by the next reversioner for possession of property on the ground of re-marriage of the widow would be governed by Article 141. On the other hand, the High Court of Calcutta has doubted the correctness of this view.³ It is submitted that the view of the Nagpur and Lahore Courts is not correct. It would be straining the language of the Article to read the words "when the female dies" in the third column of the Article as including cases of civil deaths.

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Where a Hindu female owning a limited estate under the Hindu law surrenders her estate to the next reversioner, she effaces herself from the succession as if she had died and the inheritance is accelerated in favour of the next reversioner.⁴ As was observed by their Lordships of the Privy Council in *Sitanna v. Viranna*,⁵ "though the doctrine of surrender by a widow has undergone considerable development in recent years, it must be remembered that the basis of it is the effacement of the widow's interest, and not the *ex facie* transfer by which such effacement is brought about. The result is merely that the next heir of the husband steps into the succession in the widow's place" On the view that 'death' within the meaning of this Article does not include civil death, it would follow that the reversioner in whose favour a surrender is made by the female owner becomes entitled to the property, not "on the death of the female"

Note 9

- 1 (1915) A I R 1915 Nag 57 (57) : 11 Nag L R 86 : 29 Ind Cas 612, *Nathu v. Mt. Nai Dahu*.

[See also (1930) A I R 1930 Nag 204 (204) : 27 Nag L R 1 : 128 Ind Cas 906, *Ganpat v. Narayan*. (Nothing was however said about Art. 141 applying to the case)]

2. (1930) A I R 1930 Lah 294 (295) : 120 Ind Cas 610, *Sawai Ram v. Arjun Singh*.

- 3 (1928) A I R 1928 Cal 714 (715) : 117 Ind Cas 703, *Tilottama Das v. Madhusudan Giri*.

v. Bhawa.

- (1884) 10 Cal 1102 (1108) (F B), *Nobolishore Sarma Roy v. Har Nath Sarma Roy*.

- (1924) A I R 1924 All 166 (167) : 79 Ind Cas 25 : 46 All 59, *Mt Sartaj v. Ramjas* (Reversing A I R 1922 All 401.)

[See also (1916) A I R 1916 Cal 606 (608) : 90 Ind Cas 578, *Sarabji v. Bhagwat Koers*

(1891) 19 Cal 236 (241, 242) : 19 Ind App 80 : 6 Sar 83 (P C), *Behari Lal v. Madho Lal*.]

5. (1931) A I R 1931 P C 105 (108) : 148 Ind Cas 828 : 61 Ind App 200 : 57 Mad 749 (P C).

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Note 9

within the meaning of this Article but by reason of the surrender. A suit therefore by the surrenderee for possession of the estate surrendered is not governed by this Article.^{5a}

There is no difference in principle whether the surrenderee is a male or female reversioner,⁶ except that in the latter case the female reversioner takes only a limited estate. Where *A*, a Hindu widow surrenders her estate in favour of her daughter *B*, but *B* dies before *A*, and the next male reversioner brings the suit for possession of the property, the cause of action would be the death of *B* and not the death of *A*.⁷ In *Viranna v. Sitanna*,⁸ where the facts were as stated above, Phillips, J., observed as follows :

"If the widow is effaced, so far as the estate is concerned, there is no ground for holding that her right is revived by the death of her daughter during her lifetime. The effacement is made in order to accelerate succession to her husband's estate. On the surrender therefore the next heir takes the property and when that heir dies, the devolution must continue in favour of the next reversioner and the succession cannot be interrupted by the mere fact that the widow is still alive. After the daughter, the deceased's estate must go to the next reversioner, and it cannot be contended that the widow is in any sense a reversioner."

The judgment of Phillips, J., was affirmed by the Privy Council in *Sitanna v. Viranna*.⁹

The proposition that the surrenderee gets, immediately on the surrender, a right to the possession of the property surrendered, is however subject to one qualification. Where before the surrender the widow or other female has alienated the property, the subsequent surrender does not, under the Hindu law, entitle the reversioners to immediate possession of the portion alienated. They must wait until her death.¹⁰ The reason is that though the alienation is not binding on the reversioner, it is binding on the widow for her life and the alienee is entitled to possession during her lifetime. It follows that a suit by the reversioner against the alienee from the female

5a (1911) 12 Ind Cas 481 (481, 432) (Lah), *Nawaz v. Muhammad Ahsan*. (Case of transfer of right by widow to reversioner—Suit by latter for possession—Article 144 applies)

6. (1934) A I R 1934 P C 105 (108) : 148 Ind Cas 828 : 61 Ind App 200 : 57 Mad 749 (P C), *Sitanna v. Viranna*.

7. (1924) A I R 1924 All 166 (167) : 46 All 59 : 79 Ind Cas 25, *Mt. Sartaji v. Ramjas*.

8. (1931) A I R 1931 Mad 218 (221) : 128 Ind Cas 701.

9. (1934) A I R 1934 P C 105 (108) : 148 Ind Cas 828 : 61 Ind App 200 : 57 Mad 749 (P C).

10. (1927) A I R 1927 Mad 530 (531) : 100 Ind Cas 689, *Ramayya v. Narayya*.
(1927) A I R 1927 All 258 (262) : 100 Ind Cas 764 : 49 All 334, *Lachhmi Chand v. Lachho*.

(1927) A I R 1927 Mad 429 (430, 431) : 100 Ind Cas 550, *Karuppa Pillai v. Irulayee*.

made before the date of the surrender will be governed by this Article.¹¹

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9—10

Where a surrender is made by a female *reserving* some property to herself for maintenance, the heir will, as regards such property, be entitled to possession only on the death of the female and a suit by the heir for possession of such property would be governed by this Article.¹²

10. "Hindu or Muhammadan female." — These words do not cover the case of a female who is a *trustee*. Her position as a trustee possesses a distinction from that occupied by her with reference to her husband's estate vesting in her by inheritance beneficially. In *Pydgantam Jaggannadha Row v. Rama Doss Patnail*,¹ a temple was dedicated by one J to the public and J acted as trustee thereof during his lifetime. He died childless and his widow who succeeded him as trustee, transferred her right of trusteeship along with certain temple property to the defendant in the year 1885 and subsequently died in 1897. The plaintiffs brought a suit in 1900 for recovery of the office and the land as being trustees in succession to her. The question arose whether Article 124 *ante* or this Article applied to the case. Their Lordships observed:

"Her (the widow's) position as trustee possesses a distinction from that occupied by her with reference to her husband's estate vesting in her by inheritance beneficially, which makes it apparent that the case is not really one within the scope of the said rule. As regards property inherited by a widow beneficially, the reversioner cannot claim relief by way of possession so long as she is alive, and a transfer by her would, at all events, be valid till her death. It is different in both respects here. Her powers of transfer are precisely those of a male trustee. . . . In other words, notwithstanding that the office would not, after the death of the female trustee, descend to her heir, the trust estate during her incumbency for all other purposes resides in her as fully and effectually as it does in a male trustee. The reason for the rule on which Article 141 is founded being thus inapplicable, the adoption of the principle of that rule here would not be warranted."

It was accordingly held that the suit was governed by Article 124 and not this Article. This view was followed by the High Court of Calcutta in the undermentioned case.² See also the undermentioned case³ where the question was raised but not decided.

11 (1915) A I R 1915 Mad 656 (658) : 26 Ind Cas 1, *Singaram Chettiar v. Kal-yanasundaram Pillai*.

12 (1931) A I R 1931 Mad 218 (221) : 128 Ind Cas 701, *Veeranna v. Sitanna*. (Affirmed by the Privy Council in A I R 1934 P C 105)

Note 10

1. (1905) 28 Mad 197 (201).

2. (1907) 6 Cal I, Jour 621 (636), *Lalabati Misram v. Bishun Chobey*.

3. (1916) A I R 1916 Mad 465 (467) : 30 Ind Cas 962, *Suppa Bhattar v. Suppa Sokkaya Bhattar*.

Article 141
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There is no difference in principle whether the surrenderee is a male or female reversioner,⁶ except that in the latter case the female reversioner takes only a limited estate. Where *A*, a Hindu widow surrenders her estate in favour of her daughter *B*, but *B* dies before *A*, and the next male reversioner brings the suit for possession of the property, the cause of action would be the death of *B* and not the death of *A*.⁷ In *Viranna v. Sitanna*,⁸ where the facts were as stated above, Phillips, J., observed as follows :

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5a. (1911) 12 Ind Cas 431 (431, 432) (Lah), *Nawaz v. Muhammad Ahsan*. (Case of transfer of right by widow to reversioner—Suit by latter for possession—Article 141 applies)

6. (1934) A I R 1934 P C 105 (108) : 148 Ind Cas 828 : 61 Ind App 200 : 57 Mad 749 (P C), *Sitanna v. Viranna*.

7. (1924) A I R 1924 All 166 (167) : 46 All 59 : 79 Ind Cas 25, *Mt. Sartaj v. Ramjas*.

8. (1931) A I R 1931 Mad 218 (221) : 128 Ind Cas 701.

9. (1934) A I R 1934 P C 105 (108) . 148 Ind Cas 828 . 61 Ind App 200 : 57 Mad 749 (P C).

10. (1927) A I R 1927 Mad 530 (531) : 100 Ind Cas 689, *Ramayya v. Narayya*.

(1927) A I R 1927 All 258 (262) : 100 Ind Cas 764 : 49 All 334, *Lachhmi Chand v. Lachho*.

(1927) A I R 1927 Mad 429 (430, 431) . 100 Ind Cas 590, *Karuppa Pillai v. Irulayee*.

made before the date of the surrender will be governed by this Article.¹¹

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Notes
9—10

Where a surrender is made by a female *reserving* some property to herself for maintenance, the heir will, as regards such property, be entitled to possession only on the death of the female and a suit by the heir for possession of such property would be governed by this Article.¹²

10. "Hindu or Muhammadan female." — These words do not cover the case of a female who is a *trustee*. Her position as a trustee possesses a distinction from that occupied by her with reference to her husband's estate vesting in her by inheritance beneficially. In *Pydigantam Jaggannadha Row v. Rama Doss Patnaik*,¹ a temple was dedicated by one J to the public and J acted as trustee thereof during his lifetime. He died childless and his widow who succeeded him as trustee, transferred her right of trusteeship along with certain temple property to the defendant in the year 1885 and subsequently died in 1897. The plaintiffs brought a suit in 1900 for recovery of the office and the land as being trustees in succession to her. The question arose whether Article 124 *ante* or this Article applied to the case. Their Lordships observed :

"Her (the widow's) position as trustee possesses a distinction from that occupied by her with reference to her husband's estate vesting in her by inheritance beneficially, which makes it apparent that the case is not really one within the scope of the said rule. As regards property inherited by a widow beneficially, the reversioner cannot claim relief by way of possession so long as she is alive, and a transfer by her would, at all events, be valid till her death. It is different in both respects here. Her powers of transfer are precisely those of a male trustee. . . . In other words, notwithstanding that the office would not, after the death of the female trustee, descend to her heir, the trust estate during her incumbency for all other purposes resides in her as fully and effectually as it does in a male trustee. The reason for the rule on which Article 141 is founded being thus inapplicable, the adoption of the principle of that rule here would not be warranted."

It was accordingly held that the suit was governed by Article 124 and not this Article. This view was followed by the High Court of Calcutta in the undermentioned case.² See also the undermentioned case³ where the question was raised but not decided.

11. (1915) A I R 1915 Mad 656 (658) : 26 Ind Cas 1, *Singaram Chettiar v. Kalyanasundaram Pillai*.

12. (1931) A I R 1931 Mad 218 (221) : 128 Ind Cas 701, *Veeranna v. Sitanna*. (Affirmed by the Privy Council in A I R 1934 P C 105.)

Note 10

1. (1905) 28 Mad 197 (201).

2. (1907) 6 Cal L Jour 621 (636), *Lalabati Musrain v. Bishun Chobey*.

3. (1916) A I R 1916 Mad 465 (467) : 30 Ind Cas 962, *Suppa Bhattar v. Suppa Sokhaya Bhattar*.

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It has been seen in Note 4 *ante* that this Article applies only to cases where the right of the plaintiff arises under the *personal law* of the parties, i. e. to cases where the plaintiff claims to succeed only in right of heirship under the personal law governing the parties. It follows that the Article is not applicable where the female was in possession, not by reason of her being entitled by law to succeed to a limited estate, but in some other capacity, for example, by contract, or by favour or as a legatee or trespasser. For, in these cases, the plaintiff cannot be said to be entitled to possession solely on the ground of his heirship under the personal law governing the parties.

11. "Immoveable property." — This Article applies only to suits for possession of *immoveable property*. It does not apply to suits to recover moveable property to which the plaintiff becomes entitled on the death of a Hindu or Mahomedan female; such a suit will be governed by Article 120.¹ See Note 12 under Article 120 *ante*. It has been held by the Privy Council in *Runchordas Vandravandas v. Parvati Bai*² that the right to sue, for the purposes of Article 120, will in such cases arise on the date of the widow's death.

It has been seen in Note 4 to Article 3 and Note 19 to Article 132 that the expression "immoveable property" in this Act must be construed in the sense in which it is defined in the General Clauses Act, 1897. The following interests have been held to be immovable property within this Article:—

1. The interest of a mortgagee of immovable property.³
2. A share in the partnership of a ginning factory.⁴

The following interests are not immovable property within this Article:—

1. A right of *malikana*.⁵
2. Money into which immovable property is converted.⁶

Note 11

1. (1922) A I R 1922 Cal 321 (328) : 49 Cal 45 : 61 Ind Cas 980, *Pramatha Nath Dose v. Bhuban Mohan Dose*.
- (1928) A I R 1928 Cal 670 (674) : 55 Cal 903 : 112 Ind Cas 496, *Aurabindo Nath v. Monorama Debi*. (The case is however not correct on another point, namely the effect of the adverse possession against the widow.)
- (1899) 23 Bom 725 (786) : 26 Ind App 71 : 1 Bom L R 607 : 3 Cal W N 621 : 7 Sar 543 (P C), *Runchordas Vandravandas v. Parvati Bai*.
2. (1899) 23 Bom 725 (736) : 26 Ind App 71 : 1 Bom L R 607 : 3 Cal W N 621 : 7 Sar 543 (P C)
3. (1924) A I R 1924 Oudh 218 (221) : 78 Ind Cas 393, *Jai Indar Bahadur Singh v. Shoo Indar Bahadur Singh*.
4. (1931) A I R 1931 All 225 (227) : 121 Ind Cas 19, *Mt. Basanti Bibi v. Babu Lal Poddar*.
5. (1929) A I R 1929 P C 166 (169) : 56 Ind App 267 : 117 Ind Cas 498 : 51 All 439 (P C), *Mt. Jagobai v. Utsai Lal*.
6. (1918) A I R 1918 Pat 548 (551) : 46 Ind Cas 627, *Radha Kishen v. Nauratan Lal*.
- (1908) 10 Bom L R 210 (230), *Ganpatrao v. Vamanrao*.

12. Suit contemplated is one against a person in possession. — The suit for possession contemplated by this Article is one *against a person who is in possession of the property to which the plaintiff has become entitled on the death of a Hindu or a Mahomedan female*. If, for example, at the death of the female no one was in possession, but several years later, defendant got into possession, a suit by the person entitled to succeed on the death of the female will not be governed by this Article, time, for such a suit, will run from the date of the defendant's entry into possession, as, up to that date, the plaintiff must be deemed to have been in constructive possession on the principle that possession follows title.¹

A suit by a Hindu reversioner for possession against the alienee from a Hindu female who is dead, is within this Article.² Where a female limited owner makes an alienation which is not binding on the estate, the person who will be entitled to succeed to the property on the death of such female has, in fact, two remedies open to him. He can, *during the lifetime of that female*, file a suit for declaration that such alienation is void for her lifetime. The Article applicable to such a suit is Article 125 *ante*. He can, *after the death of the female*, sue for possession of the property from the alienee in which case this Article will be applicable.³ The two remedies are not, however, mutually exclusive and the failure to pursue the former remedy does not bar the latter. In other words, it is not a condition precedent to the maintainability of the suit for possession after the death of the female that the plaintiff should have sued for, and obtained, a declaration as to the invalidity of the alienation.⁴ The fact that a suit for such a declaration has been allowed to be barred under

Note 12

- 1 (1932) A I R 1932 Cal 501 (505) : 138 Ind Cas 349, *Mahendranath Bagchi v. Taral Chandra*.
- 2 (1905) 2 Cal L Jour 144 (146), *Naba Krishna Roy v. Hem Lal Roy*.
(1905) 33 Cal 257 (261, 269, 272) : 9 Cal W N 636 : 1 Cal L Jour 408, *Harihar Ojha v. Dasarathi Misra*.
(1916) A I R 1916 Lah 289 (289) : 46 Ind Cas 565, *Khan Bahadur v. Ibrahim Khan*.
(1911) 11 Ind Cas 372 (372) (Lah), *Jawala v. Indar*.
(1892) 1892 Pun Re No. 141, *Budda v. Khan* (Article 114 does not apply)
(1892) 1892 Pun Re No. 110, *Hari Kishen Das v. Allah Bakhsh*.
- 3 (1937) A I R 1937 Pat 105 (107) : 168 Ind Cas 326, *Baldeo Das v. Raghunandan Das*.
(1931) A I R 1931 Mad 597 (598) : 133 Ind Cas 773, *Purushotama Ratho v. Brindavana Dass*.
(1916) A I R 1918 Mad 659 (660) : 42 Ind Cas 540, *Venkatramanayya v. Dejjappa Konde*.
(1868) 10 Suth W R 276 (277), *Suntolhee Thakoor v. Mt Balasee Koonwur*.
4. (1907) 31 Bom 1 (4) : 8 Bom L R 675, *Rakhmabai Pandurang v. Keshav Raghunath*.
(1915) A I R 1915 Bom 242 (243) : 40 Bom 51 : 30 Ind Cas 909, *Mancharam Pranjivandas v. Panubhai Lallubhai*.
(1905) 33 Cal 257 (261, 269, 272) : 9 Cal W N 636 : 1 Cal L Jour 408, *Harihar Ojha v. Dasarathi Misra* (The alienation need not be set aside under Article 91.)

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It has been seen in Note 4 *ante* that this Article applies only to cases where the right of the plaintiff arises under the *personal law* of the parties, i. e. to cases where the plaintiff claims to succeed only in right of heirship under the personal law governing the parties. It follows that the Article is not applicable where the female was in possession, not by reason of her being entitled by law to succeed to a limited estate, but in some other capacity, for example, by contract or by favour or as a legatee or trespasser. For, in these cases, the plaintiff cannot be said to be entitled to possession solely on the ground of his heirship under the personal law governing the parties.

11. "Immoveable property." — This Article applies only to suits for possession of *immovable property*. It does not apply to suits to recover moveable property to which the plaintiff becomes entitled on the death of a Hindu or Mahomedan female; such a suit will be governed by Article 120.¹ See Note 12 under Article 120 *ante*. It has been held by the Privy Council in *Runchordas Vandravandas v. Parvati Bai*² that the right to sue, for the purposes of Article 120, will in such cases arise on the date of the widow's death.

It has been seen in Note 4 to Article 3 and Note 19 to Article 132 that the expression "immovable property" in this Act must be construed in the sense in which it is defined in the General Clauses Act, 1897. The following interests have been held to be immovable property within this Article:—

1. The interest of a mortgagee of immovable property.³
- 2 A share in the partnership of a ginning factory.⁴

The following interests are not immovable property within this Article:—

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5. (1929) A I R 1929 P C 166 (169) : 56 Ind App 267 : 117 Ind Cas 498 : 51 All 439 (P C), *Mt. Jaggobai v. Utsava Lal*.
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12. Suit contemplated is one against a person in possession. — The suit for possession contemplated by this Article is one against a person who is in possession of the property to which the plaintiff has become entitled on the death of a Hindu or a Mahomedan female. If, for example, at the death of the female no one was in possession, but several years later, defendant got into possession, a suit by the person entitled to succeed on the death of the female will not be governed by this Article. time, for such a suit, will run from the date of the defendant's entry into possession, as, up to that date, the plaintiff must be deemed to have been in constructive possession on the principle that possession follows title.¹

A suit by a Hindu reversioner for possession against the alienee from a Hindu female who is dead, is within this Article.² Where a female limited owner makes an alienation which is not binding on the estate, the person who will be entitled to succeed to the property on the death of such female has, in fact, two remedies open to him. He can, during the lifetime of that female, file a suit for declaration that such alienation is void for her lifetime. The Article applicable to such a suit is Article 125 ante. He can, after the death of the female, sue for possession of the property from the alienee in which case this Article will be applicable.³ The two remedies are not, however, mutually exclusive and the failure to pursue the former remedy does not bar the latter. In other words, it is not a condition precedent to the maintainability of the suit for possession after the death of the female that the plaintiff should have sued for, and obtained, a declaration as to the invalidity of the alienation.⁴ The fact that a suit for such a declaration has been allowed to be barred under

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(1911) 11 Ind Cas 372 (372) (Lah), *Jawala v. Indar*.
(1892) 1892 Pun Re No 141, *Budda v. Khan*. (Article 114 does not apply)
(1892) 1892 Pun Re No 110, *Har Kishan Das v. Allah Baksh*.
3. (1937) A I R 1937 Pat 105 (107) : 169 Ind Cas 326, *Baldeo Das v. Raghunandan Das*.
(1931) A I R 1931 Mad 597 (598) : 133 Ind Cas 773, *Purushotama Ratho v. Brindavana Dass*
(1918) A I R 1918 Mad 659 (660) : 42 Ind Cas 540, *Venkatramanayya v. Dejappa Konde*
(1868) 10 Suth W R 276 (277), *Suntokhee Thakoor v. Mt. Balasee Koonwur*.
4. (1907) 31 Bom 1 (4) : 8 Bom L R 675, *Rakhmabai Pandurang v. Keshav Raghunath*.
(1915) A I R 1915 Bom 242 (243) : 40 Bom 51 : 30 Ind Cas 909, *Mancharam Pranjandas v. Panubhai Lallubhai*
(1905) 33 Cal 257 (261, 269, 272) : 9 Cal W N 636 : 1 Cal L Jour 408, *Harihar Ojha v. Dasarathi Misra* (The alienation need not be set aside under Article 91)

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Article 125,⁵ will not affect the maintainability of a suit for possession after the death of the female. In *Rangaswamy Goundan v. Nachiappa Goundan*,^{5a} their Lordships of the Privy Council observed as follows:

"It is well settled that though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which, up to that date, might be defeated by birth or by adoption"

In the undermentioned case⁶ the reversioner filed a claim in execution proceedings against the widow in her lifetime and the claim was dismissed. He failed to file a suit to set aside the claim order within one year of the date thereof. It was held that such a failure did not bar his suit for possession filed after the death of the female.

13. Adverse possession against female—Effect of.—It was established as early as the year 1863, by the decision of their Lordships of the Privy Council in *Katama Natchiar v. Raja of Shivagunga*¹ that a Hindu widow represented the inheritance and that a decree fairly and properly obtained against her would be binding not only on her but on the reversionary heirs as well.^{1a}

(1923) A I R 1923 Pat 122 (128) : 68 Ind Cas 391 : 2 Pat 217, *Kesho Prasad Singh v. Chandrika Prasad Singh*. (Do)

: 9 Bom L R 602.
m 133 : 17 Mad L

tar Kaur v. Sohan

Singh. (Do)

(1918) A I R 1918 Mad 659 (660) : 42 Ind Cas 540, *Venkatramanayya v. Dejappa Konde*.

(1931) A I R 1931 Mad 597 (598) : 183 Ind Cas 778, *Puushotama Ratho v. Brundatana Dass*

(1925) A I R 1925 Bom 9 (11) : 48 Bom 654 84 Ind Cas 374, *Hanangowda Shidgouda v. Irgowda Shidgouda*.

(1906) 3 Nag L R 35 (40), *Anand Rao v. Bansinath*.

(1870) 13 Suth W R 52 (52, 54, 55) : 5 Beng L R 585, *Mt. Raj Kunwar v. Mt. Indirji Koonuar*.

[See also (1915) A I R 1915 Mad 217 (220) : 24 Ind Cas 519, *Chattan Rajah v. Raman Yarna*]

5 (1906) 29 Mad 390 (408) : 1 Mad L Tim 183 : 16 Mad L Jour 307 (F B), *Punnamma v. Perrazu*.

(1908) 12 Cal W N 857 (858, 859), *Mt. Mesraw v. Girjanudan Tevari*.

(1865) 2 Suth W R 271 (274), *Monshee Syed Amir Ali v. Mohendra Nath Bose*.

(1882) 1882 Pun Re No. 15, *Jauahir Singh v. Gusam Lal*.

5a (1918) A I R 1918 P C 196 (202) : 42 Mad 523 : 46 Ind App 72 : 50 Ind Cas 498 (P C).

C. (1895) 20 Bom 801 (803), *Tai v. Ladu*.

Note 13

1. (1863) 9 Moo Ind App 543 (608) : 2 Suth W R 31 : 1 Suther 520 : 2 Str 25 (P C)

1a. See the following cases to the same effect :

(1917) A I R 1917 P C 95 (98) : 45 Cal 590 : 45 Ind App 35 : 44 Ind Cas 408 (P C), *Amrit Narayan Singh v. Gaya Singh*.

Lord Justice Turner in delivering the judgment of the Board observed as follows:

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"The whole estate would, for the time, be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

In *Amrit Narain Singh v. Gaya Singh*,² the principle of the *Shiraganga* decision¹ as regards a widow's estate under the Hindu law, was applied also to the case of a female other than a widow, where she holds a woman's estate by inheritance under the Hindu law. In *Harinath Chatterjee v. Mothurmohun*,³ it was held that the principle of the decision in the *Shiraganga* case¹ would apply, even where the decree against the Hindu widow in her lifetime was founded upon the law of limitation. And the same view was followed

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- (1897) 19 All 357 (371): 1897 All W N 80, *Hanuman Prasad Singh v. Bhaguti Prasad*.
 (1898) 20 All 841 (848): 1898 All W N 65, *Thribuwan Sundar Kuar v. Sri Narain Singh*.
 (1923) A I R 1923 All 448 (448): 75 Ind Cas 614, *Jaggannath Singh v. Sardar Singh*.
 (1917) A I R 1917 Bom 11 (13): 42 Bom 69. 43 Ind Cas 233, *Ganpati Bhatta Neelmanee v. Ramkrishna Bhatta Shankar Bhatt*.
 (1937) A I R 1937 Bom 458 (460): 172 Ind Cas 184: I L R (1937) Bom 906, *Madivalappa Irappa v. Subbappa Shankreppa*.
 (1914) A I R 1914 Cal 544 (546): 23 Ind Cas 931, *Gobindanath v. Mohini Mohun*.
 (1912) 14 Ind Cas 142 (143): 39 Cal 887, *Jharula Das v. Jalandhar Thakur*.
 (1915) A I R 1915 Cal 629 (632): 27 Ind Cas 954, *Mohendra Nath Biswas v. Mt. Shamsunnessi Khatun*.
 (1930) A I R 1930 Cal 165 (168): 57 Cal 289: 123 Ind Cas 444, *Abinash Chandra v. Narahari Mather*.
 (1898) 1898 Pun Re No 29, *Hira Singh v. Sher Singh*.
 (1900) 3 Ind Cas 984 (935, 986) (Lah), *Mt. Mehran v. Qudrut Ullah*.
 (1918) A I R 1918 Mad 639 (600): 42 Ind Cas 540, *Venkatramanayya v. Dejappa Konde*.
 (1920) A I R 1920 Mad 601 (602): 60 Ind Cas 635, *Shunmuga Velayudham v. Koyappa Chettiar*.
 (1924) A I R 1924 Mad 301 (304): 73 Ind Cas 284, *Rajagopalan v. Ramamoorthy*.
 (1906) 8 Nag L R 35 (40), *Anand Rao v. Bansunath*.
 (1919) A I R 1919 Oudh 213 (214): 22 Oudh Cas 156: 52 Ind Cas 845, *Achhaybar v. Har Gobind*.
 2. (1917) A I R 1917 P C 95 (98): 45 Cal 590: 45 Ind App 35: 44 Ind Cas 408 (P C).
 3. (1893) 21 Cal 8 (18): 20 Ind App 183: 6 Bar 334: 17 Ind Jur 481 (P C).

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in *Vaithilinga v. Shirengath Anni*.⁴ In the recent case of *Rajalakshmi v. Bholanath*,^{4a} the rule in the *Shivaganga case*¹ has been explained as being applicable only where a decree has been fairly and properly obtained against a widow in a suit in which a question of title is in issue and not merely a question of the widow's possession during her life.

The question arises whether the principle of the *Shivaganga case*¹ applies to cases of *adverse possession* against a female limited owner where no decree has been obtained against the female owner. In other words, does the female owner represent the estate for the purposes of limitation with the result that a bar by adverse possession against the female would operate as a bar against the reversionary heirs?

Under the Act of 1859 suits for possession of immovable property had to be brought within twelve years of the date when the cause of action arose. In cases of adverse possession against a female, her cause of action arose on the date when the possession became adverse to her. It was held in cases arising under that Act that the female represented the inheritance even for purposes of limitation, that therefore the cause of action was the same both for the female and for the reversionary heirs⁵ and that, therefore, where the female was barred and her title extinguished by adverse possession, the reversioners would also be barred.⁶ The basis of the view was that the principle of the *Shivaganga case*¹ was not limited to cases of decrees against a Hindu widow, but extended also to cases of adverse possession against the female owner. On the introduction in 1871 of Article 142, corresponding to this Article, giving the reversioner a period of twelve years from the death of the female, the view that adverse possession which would be a bar against the widow would operate as a bar against the reversionary heirs also, was given up and it was generally held that a female limited owner did not represent the estate for purposes of

4. (1925) A I R 1925 P C 249 (256). 52 Ind App 322. 48 Mad 883 : 92 Ind Cas 85.

4a. (1938) A I R 1938 P C 254 (257) : 177 Ind Cas 1 (P C).

5. (1868) 9 Suth W R 505 (503, 509, 510) : Beng L R Supp Vol. 1003 (F B), *Nobin Chunder v. Issur Chunder*.

6. 3 Suther

Gopal v. Girindra Nath.

(1893) 5 All 532 (537) : 1893 All W N 117 : 8 Ind Jur 206, *Adizzo Narain Singh v. Dukharan Singh*.

(1890) 14 Bom 317 (318), *Babu v. Bhikaji Sadashiv*.

(1917) A I R 1917 Bom 11 (13) : 42 Bom 69 : 43 Ind Cas 233, *Ganpati Bhatta Neelmanee v. Ramkrishna Bhatta Shankar Bhatt*.

(1864) 1864 Suth W R Gap 83 (88), *Mt. Parbutty Moflessa v. Mt. Rajoo*.

(1875) 24 Suth W R 86 (87n) : 3 Beng L R A C 362, *Radha Mohan Dhar v. Ram Das Dey*.

(1867) 8 Suth W R 256 (257), *Ram Dayal Gossain v. Kattyante Debia*.

(1869) 12 Suth W R 97 (98) : 3 Beng L R A C 208, *Ganga Charan Roy Chowdhury v. Jagannath Dutt*.

limitation and that therefore adverse possession against the female did not affect the reversioner's right to recover possession within twelve years of the death of the female.⁷ A contrary view was also

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- (1869) 12 Suth W R 413 (417) : 3 Beng L R A C 437, *Tarinee Churn Gangooly v. John Watson*.
 (1869) 11 Suth W R 289 (289), *Chunder Nath Sein v. Anundmoyee Dossee*.
 (1869) 11 Suth W R 9 (10) : 2 Beng L R App 14, *Gopal Singh v. Kanhaya Lal Sahebzada*.
 (1870) 4 Beng L R A C 196 (199), *Rajkishore Dutt Roy v. Girish Chandra Roy Chowdhury*.
 (1887) 14 Cal 323 (344), *Drobonmoy Gupta v. Davis*.
 (1893) 2 Cal W N 162 (164), *Mohema Chunder Roy Chowdhury v. Gour Nath Dey Chowdhury*.
 (1895) 23 Cal 460 (470), *Sham Lal Mitra v. Amarendra Nath Bose*.
 (1915) A I R 1915 Cal 629 (633) : 27 Ind Cas 954, *Mohendranath v. Mt. Shamsunnessa Khatun*.
 (1905) 3 Ind Cas 415 (416) (Cal), *Abhoy Churn Ghose v. Altarmoni Dasseo*.
 (1890) 13 Mad 512 (514, 515), *Sambasiva v. Ragata*.
 (1918) A I R 1918 Mad 659 (660) : 42 Ind Cas 540, *Venkatramanayya v. Dejjappa Konde*.
 (1918) A I R 1918 Mad 756 (757) : 42 Ind Cas 228, *Ramachandra v. Audemma*.
 (1891) 1 Mad L Jour 392 (393), *Ragata v. Sambasiva*.
 [See also (1897) 21 Bom 646 (670), *Fundratian Das v. Cursondas*.]

See also the following cases where it was held that title which was extinguished by adverse possession under Act 14 of 1859 could not be revived by the subsequent passing of the Act of 1871 :

- (1893) 26 Cal 285 (295, 296), *Braja Lal Sen v. Jiban Krishna Roy*.
 (1890) 13 Mad 467 (470), *Santharan v. Periasamy*.
 (1894) 17 Mad 473 (475) : 4 Mad L Jour 192, *Ranga Rau v. Dhairayammi*.
 (1915) A I R 1915 Mad 637 (639) : 27 Ind Cas 109, *Venkoba Row v. Nataraja Cheltiar*.
 (1911) 10 Ind Cas 477 (480) : 33 All 356 : 38 Ind App 87 (P C), *Khunni Lal v. Gobind Krishna Narain*.
 7. (1925) A I R 1925 Oudh 729 (730) : 87 Ind Cas 1021, *Bhagwan Din v. Ajudhia*.
 (1892) 14 All 156 (159) : 1892 All W N 22 (F B), *Ram Kal v. Kedar Nath*.
 (1901) 23 All 448 (453) : 1901 All W N 133, *Amrit Dhar v. Budesri Prasad*.
 (1903) 25 All 435 (439) : 1903 All W N 93, *Jhamman Kunwar v. Tiloki*.
 (1918) A I R 1918 All 15 (16) : 41 All 154 : 47 Ind Cas 222, *Mt. Ganga v. Kanha Lal*.
 (1923) A I R 1923 All 448 (448) : 75 Ind Cas 614, *Jagannath Singh v. Sardar Singh*.
 (1928) A I R 1928 All 561 (562) : 51 All 188 : 112 Ind Cas 801 (F B), *Bankey Lal v. Raghunath Sahai*.
 (1929) A I R 1929 All 739 (740) : 119 Ind Cas 855, *Phul Chand v. Gobardhan Das*.
 (1930) A I R 1930 All 307 (308) : 120 Ind Cas 447, *Kal Pratap Misir v. Amla Pat Tewari*.

 (1900) 2 Bom L R 106 (107), *Hathisingh v. Sati Lal*.
 (1902) 4 Bom L R 893, *Jamnabhai v. Dharsey*.
 (1916) A I R 1916 Bom 68 (77) : 41 Bom 315 : 38 Ind Cas 552, *Laxmipati-
rao v. Venkatesh Tirmal*.
 (1916) A I R 1916 Mad 709 (710) : 30 Ind Ind Cas 991, *Shrinivasa Raya v. Ramappa Hebbara*.

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taken in some cases, namely that the principle of the *Shivaganga case*¹ would even now apply to cases of *adverse possession* against the

- (1917) A I R 1917 Bom 11 (13) : 42 Bom 69 : 43 Ind Cas 233, *Ganpatibhatta Neelmanee v. Ramkrishna Bhatta Shankar Bhatt*.
 (1917) A I R 1917 Bom 15 (16) : 44 Ind Cas 926, *Das Jayagauri v. Purshotamdas Sundar Lal*.
 (1918) A I R 1918 Bom 142 (144) : 42 Bom 714 : 47 Ind Cas 153, *Malkarjun v. Amrta*.
 (1923) A I R 1923 Bom 364 (365) : 77 Ind Cas 479, *Pandurang Wasudeo v. Basappa Shiddappa*.
 (1893) 9 Cal 934 (937) : 13 Cal L R 372 (F B), *Sreenath Kur v. Prosunno Kumar Ghose*.
 (1894) 10 Cal 1003 (1007) : 9 Ind Jur 149, *Ram Pershad Chowdhury v. Jokhoo Roy*.
 (1907) 6 Cal L Jour 490 (522), *Roy Radha Kissen v. Nauratan Lal*.
 (1929) A I R 1929 Cal 93 (95) : 114 Ind Cas 139, *Siva Prasad v. Bhadrarani Das*.
 (1930) A I R 1930 Cal 165 (167, 168) : 57 Cal 283 : 123 Ind Cas 444, *Abinash Chandra Ghosh v. Narahari Mather*.
 (1895) 1895 Pun Re No. 74, *Saidulla v. Mt. Laila*.
 (1903) 1903 Pun Re No. 41, *Rulia v. Rulia*.
 (1920) A I R 1920 Lah 500 (501) : 68 Ind Cas 299, *Nand Singh v. Dhankaur*.
 (1923) A I R 1923 Lah 106 (107) : 68 Ind Cas 177, *Channan Singh v. Salig Ram*.
 (1891) 15 Mad 6 (9, 10), *Shankarn v. Kesavan*.
 (1903) 26 Mad 143 (147) : 12 Mad L Jour 197, *Sreeramulu v. Kristamma*.
 (1869) 5 Mad H C R 428 (432), *Atchamma v. Subba Rayudu*.
 (1915) A I R 1915 Mad 217 (220, 221) : 24 Ind Cas 519, *Chattan Rajah v. Raman*.
 (1915) A I R 1915 Mad 539 (540) : 25 Ind Cas 692, *Venkataramnam v. Venkataramiah*.
 (1917) A I R 1917 Mad 43 (47) : 37 Ind Cas 733, *Neela Kanta Rao v. Narayanswamy Iyer*.
 (1920) A I R 1920 Mad 421 (426) : 119 Ind Cas 57, *Ayyasami Iyer v. Mahadeva Iyer*.
 (1900) 13 O P L R 81 (83), *Rampershad Tewari v. Anandlal*.
 (1914) A I R 1914 Nag 81 (81) : 10 Nag L R 35 : 23 Ind Cas 719, *Sheo Lal v. Mt. Sheorajia*.
 (1927) A I R 1927 Nag 104 (105) : 22 Nag L R 175 : 100 Ind Cas 446, *Mt. Deshrani v. Kishore Singh*.
 (1927) A I R 1927 Nag 226 (228) : 101 Ind Cas 822, *Deoram Gujar v. Biju Gujar*.
 (1930) A I R 1930 Nag 204 (204) : 27 Nag L R 1 : 123 Ind Cas 906, *Ganpat v. Narayan*.
 (1923) A I R 1923 Oudh 31 (35) : 68 Ind Cas 534, *Mt. Parbat v. Muhammad Hadi*.
 (1925) A I R 1925 Oudh 164 (166) : 78 Ind Cas 65, *Mt. Raj Dulari v. Mt. Chandesar Dei*.
 (1928) A I R 1928 Oudh 155 (192) : 108 Ind Cas 817, *Abdul Halim v. Raja Saadat Ali*.
 (1920) A I R 1920 P. & F. 111 (111) : 100 Ind Cas 111, *Abdullah v. Abdur Rahman*.

Ghaus.

- (1911) 11 Ind Cas 981 (992) (All), *Dansidhar v. Lachmi Narain*.
 (1912) 14 Ind Cas 71 (72) : 1912 Pun Re No. 52, *Nur Ahmad v. Rahim Dalhish*.

female, so that the Article can be applied subject to such principle.⁸ The conflict of opinion has now been set at rest by the decision of their Lordships of the Privy Council in *Mt. Jaggo Bai v. Utsava Lal*,⁹ where it has been held that, except where there has been a decree or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled to rely upon Article 141 for the purposes of determining the question whether the title is barred by lapse of time. In that case there had been adverse possession against a Hindu widow for over twelve years after which she died and the suit was brought by the reversionary heir within twelve years of her death. Their Lordships observed as follows :

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"The judgment of their Lordships' Board in the *Shivaganga case*¹ established the principle of the representation of the inheritance by a Hindu widow. That case was decided during the currency of the Act of 1859. In *Harimath Chatterjee v. Mothurmohun*,¹⁰ their Lordships' Board held that the effect of the Acts of 1871 and 1877 was not to except from the rule laid down in the *Shivaganga* decision,¹ the case where a decree had been obtained against a Hindu widow in her lifetime, founded upon the law of limitation. . . . It is therefore established by this decision that where a decree founded upon the law of limitation is obtained against the widow in her lifetime the reversionary heir is barred and does not get the benefit of Article 141. The question raised by the present case is whether the same result follows where there has been no decree, though at the death of the widow, a stranger has been in adverse possession for twelve years or more. In their Lordships' judgment where there has been no decree against the widow or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon Article 141 for the purpose of the determination of the question

(1912) 17 Ind Cas 196 (187) (Mad), *Ponma Thirumalai Vanday Thevar v. Kandasamy Vendaya Thevar*.

(1913) 18 Ind Cas 948 (948) (All), *Shoo Chaudhari v. Sadho Das*.

(1913) 18 Ind Cas 959 (959) (All), *Hardwar Rai v. Balaram Rai*.

(1926) 95 Ind Cas 18 (19) (Nag), *Mt. Mulha Bai v. Amru*.

8. (1928) A I R 1928 Cal 670 (674) . 55 Cal 903 . 112 Ind Cas 496, *Aurabinda Nath Tagore v. Manorama Debi*.

(1930) 51 Cal L Jour 23 (24, 25), *Radha Krishna Kulal v. Nal Kamal Kulal*.

(1897) 19 All 357 (871) . 1897 All W N 80, *Hanuman Prasad Singh v. Bhagwati*.

(1898) 20 All 42 (46) . 1897 All W N 195, *Tika Ram v. Shama Charan*.

[See also (1929) A I R 1929 Oudh 153 (154) 115 Ind Cas 101 4 Luck 592, *Mt. Lachmin v. Ishuri Prasad*.]

9. (1929) A I R 1929 P C 166 (170) . 56 Ind App 267 . 117 Ind Cas 498 51 All 439 (P C).

10 (1893) 21 Cal 8 (18) 20 Ind App 183 . 17 Ind Jur 481 . 6 Sar 331 (P C).

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whether the title is barred by lapse of time. To hold otherwise, would, in their Lordships' opinion, in effect, compel the Court in determining a question within the scope of the Article to ignore the express words of the Article.

"But their Lordships are further of opinion that the point is already concluded by the judgment of their Board in *Runchordas Vandrarandas v. Parvatibai*¹¹. . . The case of *Vaithilinga Mudaliar v. Shrirenagath Anni*,¹² illustrates the application of the rule in the *Shiraganga case*,¹ where a decree founded upon adverse possession has been obtained against a Hindu widow in her lifetime. The decision is not, in their Lordships' judgment, in conflict with that in *Runchordas Vandrarandas v. Parvatibai*,¹³ in which no decree had been obtained against the widow, nor had there been any other act in the law in the lifetime of the widow destroying the heir's interest."

The decision of the Privy Council has been followed in cases decided subsequently.¹⁴

14. Adverse possession against last male owner. — Where adverse possession commences to run against the *last male owner* himself, the intervention of the limited estate will not prevent time running and will not enable the reversioner coming after the limited owner to say that he got a fresh cause of action on the death of the owner of the limited estate.¹ In *Mohendra Nath v. Shamsunnessa*

11. (1899) 23 Bom 725 (736) : 26 Ind App 71 : 1 Bom L R 607 : 3 Cal W N 621 : 7 Sar 543 (P C).

12. (1925) A I R 1925 P C 249 (251) : 52 Ind App 322 : 43 Mad 583 : 92 Ind Cas 85 (P C).

13. (1899) 23 Bom 725 (736) : 26 Ind App 71 : 1 Bom L R 607 : 3 Cal W N 621 : 7 Sar 543 (P C).

14. (1932) A I R 1932 Bom 434 (435) : 139 Ind Cas 23, *Bai Manchha v. Tribhoran Lallubhai*.

(1935) A I R 1935 Cal 702 (703) : 159 Ind Cas 1101 : 63 Cal 155, *Herendra Nath Roy v. Jnanendra Prasanna Bahaduri*.

(1936) A I R 1936 Cal 34 (36) : 160 Ind Cas 870, *Mahendra Narayan Roy v. Dalskama Ranjan Roy*.

(1935) A I R 1935 Mad 664 (666) : 157 Ind Cas 1100, *Ramappa v. Subba Rao*.

(1937) A I R 1937 Bom 453 (461) : 172 Ind Cas 184 : I L R (1937) Bom 906, *Madireappa v. Subbappa*.

(1930) A I R 1930 Bom 545 (552) : 54 Bom 587 : 127 Ind Cas 897, *Shankar-bhai v. Bai Shri*.

(1920) A I R 1920 Pat 573 (574) : 9 Pat 634 : 125 Ind Cas 181 : *Muni Lal v. Nath Sahay*.

[See also (1933) A I R 1933 Oudh 170 (172) : 8 Luck 538 : 150 Ind Cas 346, *Eajeshar Bai v. Har Kishan Bai*.]

Note 14

1. (1922) A I R 1922 Mad 53 (60) : 45 Mad 370 : 67 Ind Cas 245, *Venam Ramayya v. Eusuram Ketamma*.

(1922) A I R 1922 Mad 12 (15) : 45 Mad 361 : 70 Ind Cas 678, *Seetaramaraju v. Subbaraju*.

Khatun,² their Lordships of the Calcutta High Court observed as follows :

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"It is plain that Article 141 applies only to cases where it is proved that the last full owner was in possession at the time of his death ; if he himself was dispossessed and time began to run against him, the operation of the law of limitation would not be arrested by the fact that, on his death, he was succeeded by his widow, daughter or mother."

Where even excluding the period of intervention of the limited estate, the adverse possession has exceeded twelve years at the time of the suit, it is of course clear that the Article will not entitle the reversioner to sue for possession.³

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- (1921) A I R 1921 Mad 272 (276) : 68 Ind Cas 734 : 44 Mad 951, *Narayanaswamy Naicker v. Periasamy Odayar*.
 (1910) 5 Ind Cas 640 (643) . 33 Mad 473, *Timmajamma Garu v. Subbaraju*.
 (1929) A I R 1929 All 419 (420) : 116 Ind Cas 740, *Jaideo Singh v. Dhoom Singh*.
 (1923) A I R 1923 Bom 364 (365) . 77 Ind Cas 479, *Pandurang Wasudeo v. Basappa Shiddappa*.
 (1930) A I R 1930 Bom 545 (552) . 54 Bom 837 . 127 Ind Cas 897, *Shankar-bhai v. Bai Shiv*.
 (1868) 9 Suth W R 460 (460), *Brinda Dabee Chowdrain v. Peary Lall Chowdhry*.
 (1892) 19 Cal 629 (634), *Mahabir Pershad Singh v. Hurrikur Pershad Narain Singh*.
 (1904) 32 Cal 165 (168), *Amrithalal Bagchi v. Jatindra Nath*.
 (1915) A I R 1915 Cal 629 (633) . 27 Ind Cas 954, *Mohendra Nath Biswas v. Mt. Shamsunnessa Khatun*.
 (1935) A I R 1935 Cal 702 (704) . 63 Cal 155 . 159 Ind Cas 1101, *Hemendra Nath v. Jnanendra Prasanna*.
 (1930) A I R 1930 Cal 474 (475) . 128 Ind Cas 201, *Bhushan Mondal v. Sar-beshwar Mondal*.
 (1923) A I R 1923 Lah 106 (106) . 68 Ind Cas 177, *Chaman Singh v. Salig Ram*.
 (1924) A I R 1924 Lah 292 (292) : 69 Ind Cas 398, *Khulu Ram v. Bhiran Das* (Suit for possession by the daughter claiming as heir to her father after the death of her mother).
 (1925) A I R 1925 Oudh 400 (401) . 86 Ind Cas 725, *Ram Narayan v. Barkhandi* (Question raised but not decided).
 (1925) A I R 1925 Oudh 729 (730) . 87 Ind Cas 1021, *Bhagwan Din v. Ajudhia*.
 (1925) A I R 1925 Pat 68 (87) . 93 Ind Cas 454 (FB), *Harishar Prasad v. Kesho Prasad*.
 (1926) A I R 1926 Pat 192 (194) . 92 Ind Cas 177 . 5 Pat 411, *Mt. Batisa Kuer v. Raja Ram Pandey*.
 (1867) 7 Suth W R 453 (454), *Ram Doolab Sandyal v. Ram Narain Moiter*. (Purchase by last full owner—Neither he nor his widow in possession—Suit by reversioner for possession—Limitation ran from death of widow).
 2. (1915) A I R 1915 Cal 629 (633) . 27 Ind Cas 954 (958).
 3. (1925) A I R 1925 Oudh 400 (401) . 86 Ind Cas 725, *Ram Narayan v. Barkhandi*.

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Note 15

15. Alienation or arrangement entered into by female.—An alienation by a female limited owner for necessity will be binding on the reversioners who have therefore no cause of action at all to recover the property in such a case. Where the alienation is not for necessity it is not binding on the reversioners. But the alienation will be valid during the lifetime of the female. The possession of the alienee is not adverse to the female, much less to the reversioners. The latter's right to recover possession from the alienee arises on the death of the female and he can sue for it within twelve years of her death.¹ The same principle will apply where the female enters into any arrangement or agreement not binding on the reversioners, by which property has been given up by her to third persons. In

Note 15

1. (1881) 8 Cal 224 (229) : 8 Ind App 210 : 4 Sar 294 : 6 Ind Jur 108 (P C), *Bibi Sahodhya v. Rai Jang Bahadur*.
- (1925) A I R 1925 P C 127 (129) 88 Ind Cas 343 : 21 Nag L R 127 (P C), *Harigir Kisingir v. Anand Bharathi*.
- (1897) 19 All 357 (371) : 1897 All W N 80, *Hanuman Pershad Singh v. Bhaguti Prasad*.
- (1901) 1901 All W N 62 (62, 63), *Shahdat Chaudri v. Bhagwati Prasad*.
- (1878) 4 Cal 523 (526) : 3 Cal L R 391, *Frosanna Nath Roy Chaudri v. Afzaloneessa Begum*.
- (1882) 8 Cal 442 (445, 446) 6 Ind Jur 526, *Pursut Koer v. Palut Roy*.
- (1883) 9 Cal 93 (95) : 5 Shome L R 84, *Gaya Prasad v. Heet Narain*.
- (1882) 10 Cal L R 337 (345), *Sheo Narain Singh v. Khurgo Keerry*. (Compromise regarded as alienation.)
- (1925) A I R 1925 Nag 306 (309) : 21 Nag L R 62 : 89 Ind Cas 44, *Wasudeo v. Bhawa*. (Do.)
- (1868) 10 Suth W R 276 (277), *Suntoakhee Thakoor v. Mt. Balasee Koonwar*.
- (1869) 11 Suth W R 183 (184) : 2 Beng L R App 39, *Gopal Mullick v. Onoop Chunder Roy*.
- (1870) 13 Suth W R 52 (52, 54, 55) : 5 Beng L R 585, *Mt. Raj Koonwar v. Mt. Indirjit Kunwar*.
- (1879) 1879 Pun Re No. 15, *Mt. Jas Devi v. Shib Dayal*.
- (1882) 1882 Pun Re No. 15, *Jawahir Singh v. Gusain Lal*.
- (1898) 1898 Pun Re No. 29, *Hira Singh v. Sher Singh*.
- (1898) 1898 Pun Re No. 79, *Chiragha v. Mahtaba*.
- (1912) 1912 Pun L R No. 198, *Kesho Das v. Nathu Mal*.
- (1915) A I R 1915 Lah 353 (354) : 27 Ind Cas 699, *Hakam Singh v. Indar*. (Mutation of names in favour of manager of manager of widow's property—Possession of manager is not adverse to next heir.)
- (1918) A I R 1918 Mad 659 (660) : 42 Ind Cas 540, *Venkatramanayya v. Dejappa Konde*.
- (1920) A I R 1920 Mad 601 (602) : 60 Ind Cas 635, *Shunmuga Velayudam v. Koyappa Chettiar*.
- (1925) A I R 1925 Nag 306 (309) : 21 Nag L R 62 : 89 Ind Cas 44, *Wasudeo v. Bhawa*.
- (1919) A I R 1919 Oudh 213 (214) : 22 Oudh Cas 156 : 52 Ind Cas 845, *Achhaibar Singh v. Hargobind Singh*.
- (1925) A I R 1925 Oudh 164 (166) : 78 Ind Cas 65, *Mt. Raj Dulari v. Mt. Chandesar Desi*.

Rajlakshmi v. Bhola Nath,² a Hindu widow had, by a private agreement given up a portion of her estate to the defendant, and the reversioner sued for possession within twelve years of the widow's death. Their Lordships of the Privy Council observed "that possession under an agreement which was not binding on the reversionary heirs, could not avail the Sons (i. e. the defendants) in a question with a reversionary heir, whose right to possess could not arise until the succession opened to such heir."

Article 141
Notes
15—15a

15a. Limited owner setting up full title. — The possession of a limited female owner is not adverse to the reversioner. Nor can she set up adverse title to herself or do anything prejudicial to the interests of the reversionary heirs of her husband.¹ She cannot

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- (1933) A I R 1933 Oudh 170 (172) : 8 Luck 538 : 150 Ind Cas 346, *Rajeshwar Bai, v. Har Kishen Bai*.
 (1936) A I R 1936 Oudh 340 (364) : 163 Ind Cas 770, *Mata Bakhsh Singh v. Ajodhya Bakhsh Singh* (Surrender by widow to third person)
 (1923) A I R 1923 Pat 72 (74) : 68 Ind Cas 601 : 2 Pat 75, *Abdur Rahman v. Wali Mohammad*.
 (1911) 10 Ind Cas 337 (388) : 1911 Pun Re No 32, *Khaire Khan v. Ghulam Ghouse*
 (1921) 63 Ind Cas 887 (893) (Cal), *Sarat Chandra v. Satindra Mohan*. (Possession of third person with widow's permission)
 (1900) 1900 Pun Re No. 53 : 1900 Pun L R No. 391, *Bhagwan Singh v. Khushala* (Do.)
 (1869) 12 Suth W R 234 (235), *Deoranel Koowar v. Mt. Indurjeet Koowar*. (Do.)
 (1872) 18 Suth W R 1 (3) : 2 Suther 581 (P C), *Sheroocommarsee Debia v. Keshub Chunder* (Do.)
 (1910) 7 Ind Cas 530 (533) (Mad), *Eman Subbiah v. Venkata Lakshminipathi* (Do.)
 (1927) 93 Ind Cas 996 (996) (Lah), *Ghulam Rasul v. Kamir* (Do.)
 2. (1938) A I R 1938 P C 254 (256) : 177 Ind Cas 1 (P C).

Note 15a

1. (1919) A I R 1919 Oudh 258 (259) : 53 Ind Cas 761 : 22 Oudh Cas 260, *Baij Nath v. Sheoraj Singh*.
 (1928) A I R 1928 Oudh 411 (414) : 112 Ind Cas 266, *Deo Datt v. Raj Bai*.
 (1902) 30 Cal 303 (303) : 30 Ind App 41 : 5 Bom L R 6 : 7 Cal W N 225 : 8 Sar 409 (P C), *Ram Anugra Narain Singh v. Choudhury Hanuman Sakai*.
 (1930) A I R 1930 All 341 (344) : 126 Ind Cas 345, *Mt Bhagwan Dei v. Shub Singh*.
 (1927) A I R 1927 All 767 (770) : 49 All 779 : 102 Ind Cas 167, *Jaisirs v. Gendan Singh*.
 (1927) A I R 1927 All 799 (801) : 102 Ind Cas 814 : 50 All 89, *Ram Surat Singh v. Badri Narain*
 (1910) 7 Ind Cas 218 (222) (Cal), *Sheolai Singh v. Goor Narain*
 (1928) A I R 1928 Oudh 67 (81) : 109 Ind Cas 835, *Md Ali Khan v. Nisar Ali Khan*.
 (1929) A I R 1929 Oudh 153 (154) : 115 Ind Cas 101 : 4 Luck 592, *Mt. Lachmin v. Ishuri Prasad*.

Article 151
Notes
151a—16

acquire full title to the property by the assertion of such right, and the reversioner would be entitled, nevertheless, to sue for possession within the time limited by this Article.²

16. Suit involving declaration as to adoption by Hindu female.—Where a Hindu widow makes an adoption which is not valid, the reversioner is entitled to bring a suit to obtain a declaration that the alleged adoption is invalid or never in fact took place. Such a suit would be governed by Article 118 *ante* which prescribes a period of six years from the date when the alleged adoption becomes known to the plaintiff. Before the decision of the Privy Council in *Kalyandappa v. Ohenbasappa*,¹ there was a difference of opinion on the question whether a suit by a reversioner for possession after the widow's death, involving the decision of an issue as to the invalidity of an adoption of the defendant alleged to have been made by the widow, would be governed by Article 118 or by this Article. The High Courts of Allahabad,² Calcutta,³ Madras⁴ and Patna⁵ and the

(1929) A I R 1929 Oudh 215 (219) : 115 Ind Cas 279, *Chandra Shekar Singh v. Jagjwan Bahsh Singh*.

(1922) 70 Ind Cas 39 (42) (Pesh), *Ranran v. Zar Gul*.

[See also (1881) 1881 Pun Re No. 83 at page 622, *Mt. Anand Koer v. Sodh Narindar Singh*.

(1929) A I R 1929 Oudh 494 (518) : 119 Ind Cas 337 : 5 Luck 305, *Nisar Ali Khan v. Md. Ali Khan*.

(1930) A I R 1930 All 109 (110) : 121 Ind Cas 701 : 52 All 222, *Dhurgati v. Ram Bharos*.

(1911) 9 Ind Cas 146 (147) (All), *Sri Chand v. Surj Koer*.]

2. (1936) A I R 1936 Pesh 125 (136) : 163 Ind Cas 64, *Ghulam Daud Khan v. Habibullah Khan*.

Note 16

1. (1924) 79 Ind Cas
 P O), 13 Ind
 and 34 Cal

329 (P O), Referred to)

2. (1886) 8 All 644 (645) : 1886 All W N 232, *Basdeo v. Gopal*.

(1895) 17 All 167 (171) : 1895 All W N 36, *Nathu Singh v. Gulab Singh*.

(1923) A I R 1923 All 25 (27) : 45 All 1 : 75 Ind Cas 14, *Mt. Rodha Dulanya v. Rashik Lal*.

(1925) A I R 1925 All 79 (80) : 46 All 637 : 87 Ind Cas 938, *Shib Deo Misra v. Ramprasad*.

3 (1869) 12 Suth W R 14 (16) : 4 Beng L R 3 (F B), *Sreenath Gangooly v. Mohesh Chunder Roy*.

(1887) 14 Cal 401 (417), *Lala Parbhu Lal v. J. Myline*.

(1910) 7 Ind Cas 427 (433) (Cal), *Bhagbat Pershad v. Murari Lal*.

(1897) 25 Cal 354 (364, 365), *Jagannath Prasad Gupta v. Ranjit Singh*.

(1900) 27 Cal 242 (254) : 4 Cal W N 405, *Ram Chandra Mukerjee v. Ranjit*.

(1905) 9 Cal W N 222 (224), *Baikanta Chandra Roy v. Kali Charan Roy*.

4. (1907) 30 Mad 308 (310) : 2 Mad L Tim 178 : 17 Mad L Jour 182, *Velaqa*

5. (1920) A I R 1920 Pat 291 (320, 321) : 46 Ind Cas 929, *Sah Deo Naram v. Kusum Kumari*.

Judicial Commissioner's Court of Nagpur^{5a} held that the reversioner was entitled to bring his suit for possession within twelve years of the death of the widow, notwithstanding he did not file any suit for a declaration as to the invalidity of an adoption alleged to have been made by the widow. The High Court of Bombay held a contrary view in some cases⁶ which however were overruled in a later Full Bench decision⁷ of the same Court. The authorities were conflicting in the Punjab⁸. The decision in *Kalyandappa's case*¹ has now set the conflict at rest. In that case *A* died leaving his widow *B*. *B* adopted *C*. *C* died leaving his widow *D*. After *D*'s death *X*, the reversioner, filed a suit for possession within twelve years of *D*'s death. The defendant *Y* contended that he had been adopted by *B* and not *C*, that such adoption was more than six years before suit to the knowledge of the plaintiff and that therefore the suit was barred by Article 118 and was not governed by this Article. Their Lordships after an exhaustive review of all the authorities negatived that contention and observed as follows :

"The words 'a suit to obtain a declaration' are terms of art. They relate back to the Specific Relief Act passed in the same year 1877, being Act No 1 of that year, whereas the Limitation Act is Act No 15. Section 42 of the Specific Relief Act deals with declaratory decrees and the illustration (letter *f*) is much in point.

* * * * *

"It is to this class of suit that this particular limitation applies. The date from which time begins to run is a subjective or a personal date ; and the condition of obtaining a particular relief which is sought in a declaratory suit is that the plaintiff should not be guilty of laches, the measure of laches being fixed by the statute as six years. But, if a claimant chooses to run the risk that an adoption which he has not attacked will have every presumption made in its favour by reason of its long standing, he can wait till his reversionary right has accrued and even till the limit (no doubt a very wide limit) of twelve years from that accruer has passed."

The view was confirmed by the Privy Council in the undermentioned case.⁹

^{5a} See the cases cited in Foot note 15 of Note 2 to Article 118.

⁶ (1899) 24 Bom 260 (285) 1 Bom L R 799 (F B), *Shrinivas Murar v. Hanmant*.

(1913) 20 Ind Cas 162 (169) 37 Bom 513, *Shrinivas Sarjerao v. Bhanant Venkatesh*.

(1900) 25 Bom 26 (30) 2 Bom L R 495, *Barot Naran v. Barot Jesang*.

⁷ (1922) A I R 1922 Bom 223 (231, 232) 46 Bom 776 67 Ind Cas 134 (F B), *Doddawa v. Yellaua Mallappa Beni*.

⁸ See Note 2 to Article 118 ante

⁹ (1931) A I R 1931 P C 84 (85) 131 Ind Cas 758, *Padmalay Acharya v. Fakira Debba*

Article 141
Notes
16—18

See also Note 2 to Article 118 *ante* for a fuller discussion.

The principle of the decision in *Kalyandappa's case*¹ applies equally to a suit which involves the *affirmation* of the fact of adoption. Where a Hindu widow adopted *B* but it was agreed that the widow was to be in possession until her death, and after her death *B* sued for possession, it was held that this Article governed the case and not Article 119 *ante*, even though the defendants denied the adoption which had therefore to be affirmed before possession could be given to the plaintiff.¹⁰

17. Suit for possession on ground of mistake. — *A*, a Hindu widow, died and *B* and *C*, the reversionary heirs, succeeded to the estate. They were entitled to equal shares, but under a mistake of law as to whether the parties took their share *per capita* or *per stirpes*, they took unequal shares. On discovery of the mistake, but within twelve years of the death of the widow, *B* who had got the smaller share sued *C* for possession of the portion necessary to equalise the share. It was held by the Judicial Commissioner's Court of Nagpur that the suit was not governed by Article 96 but by this Article.¹ As has been seen in Note 2 to Article 96, it applies only when the plaintiff cannot succeed without proving the mistake, and not to cases where the plaintiff sues on an existing *title*, though he alleges a mistake also. In the case cited above, *B* clearly had *title* to an unequal moiety of the property though, as a reason for his not taking such share he alleged a mistake of law.

18. Suit for redemption of mortgage made by last male owner where mortgagee has, during widow's lifetime, transferred it to third party. — *A*, a male owner of property, mortgages the same to *M* with possession and subsequently dies leaving a widow *B*. During the lifetime of *B*, *M* transfers the property to *N* absolutely. *C*, the reversionary heir of *A*, after *B*, files a suit for redemption and possession, more than twelve years after the transfer by *M* to *N*, but within twelve years of the death of *B*. It has been held by the High Court of Madras in the undermentioned case¹ that the suit is not governed by this Article but by Article 134 and that the suit, though for redemption, is barred under that Article. As has been seen in Note 6 *ante*, this Article will have no application

10. (1934) A I R 1934 Bom 110 (112) : 58 Bom 280 149 Ind Cas 674, *Bhagirathi Bai v. Appa Dada*. (The view, however, that Article 141 applies even where the widow is in possession under an *agreement* is not correct. See Note 4 *ante*.)

Note 17.

1. (1920) A I R 1920 Nag 106 (108) : 55 Ind Cas 422, *Wasudeo v. Vithal*.

Note 18

1. (1921) A I R 1921 Mad 272 (275) : 44 Mad 951 : 68 Ind Cas 734, *Narayana-swamy Naicker v. Periasamy Odayar*.

if it is a suit for redemption of a valid mortgage by *A*, the reason being that *C* is not entitled in such a case to the possession of the property solely by reason of the death of the female owner. But the reasoning of the High Court of Madras in the above decision that Article 141 does not apply *because Article 134 applies* does not seem to be correct on principle. If both Articles 134 and 141 are assumed to apply to a suit for redemption *under the circumstances noted above*, it is submitted that Article 134 should not be preferred inasmuch as the doing so on the facts of the particular case would be to ignore the fundamental principle of the law of limitation that prescription does not run against a person who is unable to act. See Note 2 *ante*. The proper Article applicable to the case would, it is submitted, be Article 148, neither Article 134 nor Article 141 being applicable.

19. Section 6 and this Article.—Where at the death of a limited female owner the reversionary heir entitled to possession happens to be under a disability such as is contemplated by Section 6 of the Act, time will not begin to run until the disability ceases. (See Note 19 to Section 6 *ante*.) It is also clear that where time has once begun to run against a reversioner on the death of a limited female owner, it cannot stop and the subsequent disability of the representative of the reversioner does not affect the running of time.¹

A, a Hindu widow, made an alienation and subsequently made adoption of a minor. The minor died during minority and *A* succeeded him as heir. Subsequent to her death, but long after adoption the reversioner sued for possession of the property alienated by the widow. It was held in the undermentioned case² that the cause of action for the suit arose in favour of the adopted son on the date of adoption and as, on that date he was a minor, he was not bound to sue until after majority, as he died before he attained majority, and as against *A* there was no adverse possession, time for the reversioner began to run only on the widow's death. It is submitted that the decision does not seem to be correct on principle. It has been seen in Note 32 to Section 6 *ante* that that Section does not prevent the running of time against a person under disability. It would follow that notwithstanding that the adopted son was a minor on the date of adoption, time will begin to run against him in favour of the alienee and such running of time would not stop by reason of his minority. Nor would the reversionary heir get a fresh cause of action against the alienee other than that which the adopted son himself had. The intervention of the limited estate would not prevent the suit from being barred.

Note 19

1 (1927) A I R 1927 All 818 (820) 50 All 152 · 107 Ind Cas 45, *Rup Kishore v. Patrani*.

2. (1931) A I R 1931 Mad 273 (274) . 129 Ind Cas 400, *Venkatanarayanan v. Rajya Lakshammama*.

Article 141
Notes
20—21

20. Onus of proof.—In a suit governed by this Article the plaintiff must prove firstly that he is the nearest reversioner,¹ and secondly that the female died within twelve years of the suit when such fact is not admitted or the defence is one of limitation.² In the undermentioned case^{2a} a contrary view has been expressed, namely that in view of Section 108 of the Evidence Act it is for the defendant to show that the female died beyond the period of limitation. It is submitted that this view is not correct.

Where the reversioner files a suit *prima facie* within twelve years of the death of the female on whose death he is entitled to possession, but the defendant pleads that the last full owner himself had been dispossessed and time ran from that date, it is for the defendant to establish his allegations.³

21. Starting point.—Time, under this Article, runs from the death of the female.¹ It is then that the property vests in the

Note 20

1. (1928) A I R 1928 Oudh 155 (192) : 108 Ind Cas 817, *Abdul Halim Khan v. Saadat Ali Khan*.
2. (1924) A I R 1924 P C 136 (136) (P C), *Ramkrishna Rao v. Srivramulu*.
(1916) A I R 1916 Bom 300 (302) : 40 Bom 239 : 33 Ind Cas 484, *Jayawant Jivanrao v. Ramchandra Narayan*.
(1860) 11 Suth W R 173 (174), *Kales Nath Talookdar v. Joy Doorga Dossia*.
(1904) 14 Mad L Jour 464 (465), *Venkata Hanumanulu v. Lachchamma*.
(1924) A I R 1924 Mad 838 (839) : 82 Ind Cas 584, *Rajagopalachariar v. Baskyachariar*.
(1916) A I R 1916 Nag 34 (35) : 18 Nag L R 16 : 39 Ind Cas 21, *Parsoo v. Munnalal*.
(1927) A I R 1927 Nag 104 (107) : 22 Nag L R 175 : 100 Ind Cas 446, *Mt. Deshrani v. Kishore Singh*.
- 2a (1920) A I R 1920 Lah 191 (192) : 1 Lah 554 : 56 Ind Cas 742, *Tani v. Rukhi Ram*.
3. (1935) A I R 1935 Cal 702 (704) : 159 Ind Cas 1101, *Hamendra Nath v. Jnanendra Prasanna*.

Note 21

1. (1881) 8 Cal 442 (445, 446) : 6 Ind Jur 526, *Pursat Keer v. Palut Roy*.
(1914) A I R 1914 P C 38 (40, 41) : 36 All 187 : 23 Ind Cas 715 (P C), *Lala Brij Lal v. Mt. Inda Kunwar*.
(1897) 21 Bom 376 (379), *Harilal v. Bai Reiva*.
(1897) 21 Bom 646 (670), *Vundravandas v. Curson Das*.
(1923) A I R 1923 Bom 364 (365) : 77 Ind Cas 479, *Pandurang v. Basappa*.
(1882) 9 Cal 93 (95) : 5 Shome L R 84, *Gaya Pershad v. Heet Narain*.
(1867) 7 Suth W R 450 (451), *Tilluck Roy v. Phoolman Roy*.
(1871) 15 Suth W R 41 (42) : 14 Moo Ind App 67 : 7 Beng L R 216. 2 Suther 422 : 2 Ser 666 (P C), *Rajendra Nath v. Jagendra Nath*.
(1918) A I R 1918 Lah 288 (289) : 46 Ind Cas 565, *Khan Bahadur v. Ibrahim Khan*.
(1934) A I R 1934 Lah 633 (636) : 152 Ind Cas 773, *Khem Chand v. Krishan Kumar*.

reversioner.² Time runs from the death of the female, not only against the nearest reversioner but against *all* reversioners near or remote. The remote reversioner does not get any fresh cause of action after the expiry of twelve years from the death of the widow.³

Where there are more females than one inheriting the property of the last male owner jointly, the words "when the female dies" in the third column of the Article must be taken to mean "after the death of all the female co-heirs"⁴ Where there are successive female owners, time will run against the reversioner from the death of the last female owner.^{4a}

Where A and B, co-widows, succeed to X, a male owner, and A thereafter surrenders her interest to B but dies before B, the reversioner's right nevertheless comes into existence only on the death of A and time begins to run from that date. He does not get a right

Article 141
Note 21

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- (1897) 20 Mad 493 (491) . 7 Mad L Jour 201, *Venkataramaya v. Venkata-lakshamma*.
 (1918) A I R 1918 Oudh 32 (54) . 44 Ind Cas 368 : 21 Oudh Cas 1, *Bisheshar Baksh v. Rameshar Baksh*.
 (1936) A I R 1936 Oudh 340 (364) . 163 Ind Cas 770, *Mata Baksh v. Ajo-dhya Baksh*.
 (1909) 3 Ind Cas 536 (536, 537) (All), *Nanak v. Sibba*.
 (1910) 5 Ind Cas 964 (965) : 34 Bom 321, *Ravji Mahadu v. Sakuji Kaloji*.
 (1912) 12 Ind Cas 453 (455) . 1912 Pun Re No. 6, *Mansaram v. Behara*.
 (1922) 65 Ind Cas 224 (230) (Pat), *Abdul Rahman v. Wali Muhammad*.
 2. (1915) A I R 1915 Nag 109 (110) : 11 Nag L R 116 . 31 Ind Cas 290, *Kashirao v. Uharda*.
 3. (1902) 4 Bom L R 893, *Jamnabai v. Dharsey*.
 (1930) A I R 1930 Lah 211 (212) . 121 Ind Cas 70, *Amarnath v. Mt. Ralli*.
 4. (1909) 4 Ind Cas 457 (459) . 31 All 557 . 36 Ind App 210 : 13 Oudh Cas 183 (P C), *Muhammad Kamil v. Imtiaz Fatima*.
 (1921) A I R 1921 Mad 246 (247) . 60 Ind Cas 185 . 43 Mad 855, *Muthiala Chengappa v. Budia Guntla*.
 (1905) 27 All 494 (498) . 1905 All W N 68, *Ram Dei Kunwar v. Abu Jafar*.
 (1894) 18 Bom 216 (220), *Mukta v. Dada*.
 (1874) 23 Suth W R 125 (126), *Gobind Chunder Majoomdar v. Dulmeer Khan*.
 (1920) A I R 1920 Lah 500 (501) . 68 Ind Cas 299, *Nand Singh v. Mt. Dhan Kaur*.
 (1911) 9 Ind Cas 50 (51) . 33 All 312, *Gajadhar Pande v. Parbati*.
 [See also (1923) A I R 1923 Mad 108 (109) . 70 Ind Cas 446, *Ranganatha Rao v. Rama Pandithar*]
 4a (1885) 11 Cal 791 (791), *Kokilmoni Dassia v. Manick Chandra*.
 (1895) 23 Cal 460 (470), *Sham Lal Mura v. Amarendra Nath*.
 (1912) 1912 Pun W R (N. W. F. P Civil) No 1 (at pages 5, 6), *Kesho Das v. Nathu Mal*.
 (1921) A I R 1921 Mad 24 (26) . 44 Mad 131 . 60 Ind Cas 583, *Ivatury Atchamma v. Pappiah*.
 (1923) A I R 1923 Mad 168 (169) . 69 Ind Cas 389, *Joga Ferrayya v. Makina Sallyya Patrudu*.
 (1905) 8 Nag L R 35 (40), *Anand Rao v. Bansinath Brahman*.
 (1937) 20 Nag L Jour 278 (280), *Parashram v. Balakrishna*.

Article 141
Notes
21—22

to the interest of the surrendering widow on the death of *B*. There can be no acceleration of the estate of the reversioner by transactions between the co-widows without the knowledge and consent of the reversioners.⁵ But where *A* and *B* inherited jointly certain property and *A* forfeits her interest in favour of *B* by reason of unchastity, and *B* thereafter gets the whole estate, the reversioners' cause of action will arise on the death of *B* even though *A* survives *B*.⁶

A, a reversioner, filed a suit against the alienee from the widow within twelve years of her death making the other co-reversioners defendants. The latter filed a written statement beyond twelve years of the widow's death claiming their share of the estate. It was held that they were not barred from doing so.⁷

During the lifetime of a Hindu widow, *A* alleging himself to be a reversioner filed a suit for declaration that an alienation by the widow was not valid. The suit was dismissed on the ground that *A* was not the reversioner, but *B*. Subsequently, after the death of the widow, *B* filed the suit as the reversioner for possession but that suit was dismissed also on the ground that he was not the reversioner. This was in the year 1916. *A*'s son thereupon sued for possession more than twelve years after the death of the widow but within twelve years of 1916. It was held that time ran from the death of the widow and, under Section 9 of the Act it did not stop running by reason of subsequent events such as the pendency of, or the decision in, *B*'s suit.⁸

22. Local and special law.—Under Section 29 *ante*, this Article will not apply even if the case is one falling within its purview, where a special period of limitation has been prescribed therefor by any special or local law.¹

5. (1921) A I R 1921 Mad 246 (247) : 43 Mad 855 : 60 Ind Cas 135, *Muthiala Chengappa v. Budragunta*.

6. (1917) A I R 1917 Lah 435 (435) : 39 Ind Cas 204, *Ghulam Sarwar v. Karam Allah & Co.*

7. (1929) A I R 1929 Bom 345 (347) : 53 Bom 472 : 119 Ind Cas 656, *Rayegavada v. Ramalingappa*.

(1909) 4 Ind Cas 249 (252) : 34 Bom 91, *Narasimha Krishnaji v. Yaman Venkatesh Deshpande*

8. (1923) A I R 1923 Mad 108 (109) : 70 Ind Cas 446, *Ranganatha Rao v. Rama Pandithar*.

Note 22

1. (1886) 13 All 108 (118), *Ranjit Tiwari v. Badri Nath*.

142.* For possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years.	The date of the dispossession or discontinuance.	Article 142
144.† For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	Twelve years.	When the possession of the defendant becomes adverse to the plaintiff.	Article 144

Synopsis

Articles 142 and 144

1. Legislative changes.
2. Scope of Articles 142 and 144.
3. Suit must be for possession.
4. Suit on possessory title.
5. Suit on proprietary title.
6. "Immoveable property."
7. Interest in immovable property.
8. "Plaintiff" in Article 142, meaning of.

* Act of 1877, Article 142
Same as above.

Act of 1871, Article 143
Same as above.

Act of 1859
No corresponding provision.

† Act of 1877, Article 144
Same as above.

Act of 1871, Article 145

Columns 1 and 2—Same as above.

Column 3 ran as follows "When the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff."

Act of 1859, Section 1, Clause 12

Limitation of twelve years Suits for immoveable property.

To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies — The period of twelve years from the time the cause of action arose.

- Arts. 142 & 144 9. "Has been dispossessed or has discontinued the possession."
10. Defendant must be in possession at the date of suit.
11. "Possession," what is.
12. Possession of part, if possession of whole.
13. Possession of house is possession of site.
14. Plaintiff only in constructive possession — Dis-possession or discontinuance of possession.
15. Principle that possession follows title.
16. Adverse possession, what is.
17. "Defendant."
18. Possession is not adverse if it can be referred to a lawful title.
19. Possession of Hindu female.
20. Possession under a temporary arrangement between members of a family.
21. Possession in lieu of dower.
22. Possession in lieu of maintenance.
23. Possession by the holder of a life estate, if can be adverse to reversioners.
24. Possession of property belonging to person under disability.
25. Possession of insolvent.
26. Possession of mortgagor, when becomes adverse to the mortgagee.
27. Possession of a co-mortgagor who redeems the mortgagee.
28. Possession of mortgagee.
29. Possession of mortgagee under invalid foreclosure proceedings.
30. Possession of mortgagee under mortgage providing that on default the mortgagee should be full owner.
31. Possession of mortgagee after purchase in contravention of Order 34 Rule 14 of the Civil Procedure Code.
32. Possession of person entering under void mortgage.
33. Possession by the mortgagee, after redemption, of accessions to mortgaged property.
34. Possession of co-mortgagee paying off other co-mortgagees.

- 35. Possession of co-owners — General. Arts. 142 & 144
- 36. Possession of alienee from co-owner.
- 37. Possession of licensee from co-owner.
- 38. Effect of partition among co-owners.
- 39. Co-owner deriving possession from a third party claiming adversely against all the co-owners.
- 40. Adverse possession against alienee of share in property.
- 41. Adverse possession by co-owners against stranger.
- 42. Abandonment by co-owner.
- 43. Relinquishment by co-owner.
- 44. Co-heirs.
- 45. Suit for possession by one co-owner against another—Article applicable.
- 46. Adverse possession of trust property by trustee.
- 47. Adverse possession of alienee from trustee.
- 48. Adverse possession of right to perform worship in temple.
- 49. Adverse possession of property of Hindu, Muhammadan or Buddhist religious endowments.
- 50. Possession of co-trustees after division among them.
- 51. Possession of alienee from co-trustee.
- 52. Acts referable to exercise of easement.
- 52a. Adverse possession—Vendor and vendee.
- 52b. Possession held under mistake, if can be adverse.
- 53. Possession of wrong-doer must be actual.
- 54. Adverse possession of surface and of subsoil rights in the land.
- 55. Possession of person who could not advance a hostile title.
- 56. Permissive possession.
- 57. Possession of agents, servants, etc.
- 58. Possession by husband or wife.
- 59. Possession of tenant.
- 59a. Encroachment by tenant.
- 60. Possession under invalid transaction.
- 60a. Possession under transfer which subsequently becomes invalid.
- 61. Adverse possession of inalienable property.

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- 61a. Adverse possession of land in military cantonments.
- 61b. Adverse possession of rights not recognized by law.
- 62. Possession of owner, if can be adverse to himself.
- 63. Possession must be continuous for the statutory period.
- 64. Break in adverse possession, effect of.
- 65. Delivery of symbolical possession, if interrupts adverse possession.
- 66. Decree does not interrupt adverse possession.
- 67. Effect of attachment on adverse possession.
- 68. Decision of Revenue Officer or Court regarding boundary, if interrupts adverse possession.
- 69. Subsequent assertion of a different title by defendant, if affects his adverse possession.
- 70. Submerged land.
- 71. Receiver and adverse possession.
- 72. Abandonment of possession.
- 73. Confiscation and re-grant.
- 74. Revenue sale — Adverse possession against purchaser.
- 75. Dispossession of wrong-doer by another, if interrupts adverse possession.
- 76. Possession must be open.
- 77. Adverse possession against minor or lunatic.
- 78. Possession is not adverse to person not having a present right to possession.
- 79. Adverse possession against holder of life-estate.
- 80. Adverse possession of trust property by stranger.
- 81. Adverse possession against one co-trustee, if adverse to the other.
- 82. Adverse possession against co-owners.
- 83. Adverse possession against widow is not adverse against subsequently adopted son.
- 84. Adverse possession against mortgagor, if adverse against mortgagee.
- 85. Adverse possession against mortgagee, if adverse to mortgagor.
- 86. Adverse possession against tenant, if adverse against landlord.
- 87. Onus of proof.
- 88. Judgment against third party does not alter onus.
- 89. Question immaterial when evidence has been let in on both sides.

90. Starting point.

91. Defendant made party after limitation.

92. Tacking.

93. Effect of adverse possession.

94. Adverse possessor can get only what quantum owner had.

95. Adverse possessor gets a title only to the interest he purports to prescribe for.

96. Evidence of adverse possession.**97. Plea of adverse possession.****98. Question of adverse possession, if one of law or fact.****99. Adverse possession by or against Crown.****99a. Adverse possession by or against the public.****100. Special or local law.***Other Topics*

- Actual knowledge on part of owner not necessary ... See Note 76, Pts. 2 to 4
- Adverse possession by successive trespassers ... See Note 92, Pts. 10 to 18
- Agent—Repudiation of agency—Essentials ... See Note 57, Pts. 11 to 13
- Alternate pleas ... See Note 97, Pt. 9
- Article 142—Suit under—Mere proof of plaintiff's title—Effect ... See Note 87, Pts. 10 to 13
- Article 142—Whether limited to suits on possessory title... See Note 5, Pts. 3 to 5
- Article 144 is residuary Article ... See Note 2, Pt. 1
- Co-owners—'Ouster'—Meaning of ... See Note 35, Pts. 6 to 10, 17 to 19, 23 to 25
- Dispossession and discontinuance—Common features of ... See Note 9, Pts. 4 to 6
- Dispossession and discontinuance—Difference between ... See Note 9, Pts. 1 to 3
- Equity of redemption—Whether can be adversely possessed ... See Note 7, Pts. 15 to 17, Note 85
- Immovable property—What are—Instances ... See Note 6, Pts. 2 to 11
- Immovable property—What are not—Instances ... See Note 6, Pts. 12 to 18
- Mere non-payment of rent by tenant cannot create adverse possession ... See Note 59, Pt. 5
- Onus in cases falling under Article 142 ... See Note 87, Pts. 4 to 14
- Onus in cases falling under Article 144 ... See Note 87, Pts. 15 to 19a
- Owner dispossessed getting back possession but again dispossessed—Time runs from second dispossession ... See Note 90, Pts. 3, 4
- Possession adverse at start—It cannot become permissive by subsequent events ... See Note 56, Pt. 14
- Possession asked as consequence of primary relief—Article 142 or Article 144 does not apply ... See Note 3, Pts. 5 to 8
- Possession obtained by plaintiff under decree of Court—Decree reversed and plaintiff dispossessed—Whether such dispossession gives cause of action against defendant previously in possession ... See Note 90, Pts. 5 to 11
- Possession of independent trespassers cannot be tacked ... See Note 92, Pt. 2
- Possession of mortgagor after discharge—Whether adverse ... See Note 29, Pts. 7a to 7d
- Possession of person dispossessing usufructuary mortgagee—Whether adverse to mortgagor ... See Note 85, Pts. 2 to 4, 10
- Possession permissive—Article 144 applies ... See Note 2, Pt. 5, Note 56, Pt. 15
- Possession under contract of sale ... See Note 52a, Pt. 9

Arts. 142 & 144 **Note 1**

Possession under title cannot be tacked to possession without title ...	...	See Note 92 F-N 6
Possession under void transfer ...	...	See Note 60, Pts. 14 to 16
Possession under voidable transfer ...	...	See Note 60, Pts. 12, 13
Sale of equity of redemption to mortgagee void or voidable—Possession of mortgagee—Whether adverse ...	...	See Note 28, Pts. 7e to 10
Space above land of owner — Whether immovable property ...	...	See Note 6, Pts. 19, 20
Submerged land—Owner presumed to be in possession: See Note 15, Pts. 21 to 23;	...	Note 70, Pts. 5, 6
Submergence will operate as interruption of adverse possession ...	...	See Note 70, Pts. 7, 9
Suit for declaration of title—Onus... ..	...	See Note 87, Pts. 20 to 25
Suit for possession—Possession need not be actual physical possession ...	...	See Note 3, Pt. 18
Suit on mere title — Failure to prove title—Whether plaintiff can succeed on ground of title by adverse possession ...	...	See Note 97, Pts. 1 to 4a
Suit on possessory title — Not barred by Section 9, Specific Relief Act ...	...	See Note 4 F-N 7
Tacking — Possession of two or more persons—Character of possession of the different persons — Whether should be same ...	...	See Note 92, Pts. 6a to 9
Trespass by agent, servant, etc ...	...	See Note 57, Pt. 15
Void lease—Tenant dispossessed by third party—Such person's possession is adverse to landlord ...	...	See Note 86, Pt. 9
Waste or jungle lands — Presumption as to possession ...	...	See Note 15, Pts. 11 to 16a, 24

1. Legislative changes.—Before the Act of 1859, limitation for suits for the recovery of immovable property was provided for by certain Regulations in force in the several Provinces. In the Provinces of Bengal and Bihar, the Courts were, under Regulations III of 1793 and VII of 1795, "prohibited hearing, trying, or determining the merits of any suit whatever against any person or persons if the *cause of action* shall have arisen twelve years before any suit shall have been commenced on account of it."^{1a} By Regulation II of 1805 it was provided that the limitation of twelve years prescribed by the two previous Regulations should not apply if the person in possession of the property claimed in the suit had acquired the possession "by violence, fraud, or by an unjust dishonest means whatever."¹

In the Province of Bombay, Regulation V of 1827 provided for such suits a limitation of thirty years. But "it shall be a sufficient answer to the plea of possession for more than thirty years, that the

Articles 142 & 144 — Note 1

1a (1866) 6 Suth W R 296 (296), *Muddun Mohan Tewaree v. Joy Koomaree Dibee*.

1. (1855) 7 Moo Ind App 238 (253, 254, 259) : 1 Bar 633 (P C), *Rajah Enayat Hossein v. Sayid Ahmed Reza*.

(1866) 5 Suth W R P C 95 (98) (P C), *Lall Dukul Singh v. Lall Rooder*.

person in possession as proprietor, or any of the persons by whom he derives his right, acquired such possession by *fraudulent means*, on proof whereof, a suit may be entertained at any period within sixty years, provided that if such property had been held for more than thirty years by a person or persons *bona fide* believing his or their title as proprietors to be good, such title shall not be affected by the fraud of a former possessor "

Arts. 142 & 144
Notes 1-2

Madras Regulation II of 1803, which applied to the Province of Madras, contained a provision similar to that provided for by the Bengal Regulation III of 1793 referred to above.

Under the Limitation Act of 1859, a suit for recovery of immovable property was governed by clause 12 of Section 1 of that Act when no other provision was applicable, and the period of limitation was twelve years from the time when the *cause of action* arose.²

Provisions corresponding to the present Articles 142 and 144 were first introduced in Articles 143 and 145 of the Act of 1871, with this difference, that the third column of Article 145 of the Act of 1871 corresponding to the present Article 144, contained the words "or of some person through whom he claims" The said words have been omitted in the later Acts apparently in view of the new definition of the word "defendant" introduced in them.

There is no difference between the present Articles 142 and 144 and the corresponding Articles in the Act of 1877.

2. Scope of Articles 142 and 144.—Article 144 is a residuary Article and applies only to suits for possession of immovable property *to which no other Article is applicable*.¹ It follows that if Article 142

2. (1883) 5 All 1 (6) 9 Ind App 99 5 Shome L R 80 4 Sar 382 (P C), *Karan Singh v Bakar Ali Khan*
(1874) 13 Beng L R 312 (322, 323) 1 Ind App 157 3 Sar 314 (P C), *Rani Mewa Kunwar v Rani Hulas Kunwar*
(1869) 3 C P L R 162 (163), *Khelsingh v Mt. Radha*.
(1870) 13 Suth W R 459 (460), *Gour Mones Moormin v. Shunkures Paharnee*.
(1864) 1 Suth W R 29 (30), *Rajah Barodahant Roy v. Sookmoy Mookerjee*.
(1879) 3 Bom 452 (785), *Bhaskarappa v Collector of North Kanara*.
(1869) 6 Bom H C R 66 (68), *Lakshuman Ramji v. Ramlal*.

Note 2

1. (1898) 23 Bom 725 (736) 20 Ind App 71 1 Bom L R 607 3 Cal W N 621 : 7 Sar 513 (P C), *Ranchordas Vandratandas v Paratibai* (Art 144

(1899) 2 Bom L R 106 (108), *Hathisingh v. Satilal* (Art. 144 does not apply where Art 141 applies)

(1917) A I R 1917 Bom 11 (13) 42 Bom 69 43 Ind Cas 283, *Subbi Ganpatibhatta v. Ramkrishnabhatta*. (Do.)

Arts. 142 & 144 Note 2 is applicable to a particular case, Article 144 cannot be applied to

- (1886) 12 Cal 594 (596, 597), *Azam Bhuyan v. Fazsuddin Ahmed*. (Do.)
- (1929) A I R 1929 Cal 93 (95) : 114 Ind Cas 139, *Shiva Prasad Saw v. Bhadraramoni Dasu*. (Do.)
- (1918) A I R 1918 Mad 469 (480) : 41 Mad 75 : 42 Ind Cas 245 (F B), *Vaidyanatha v. Savithri Ammal* (Do.)
- (1902) 25 Mad 507 (510, 511, 512) : 12 Mad L Jour 119, *Seshamma Shet-tati v. Chichaya Hegade*.
- (1926) A I R 1926 Mad 181 (181) : 91 Ind Cas 454, *Kuppuswami Mudaliar v. Chockalainga Mudaliar*.
- (1931) A I R 1931 Mad 707 (710) : 54 Mad 883 : 135 Ind Cas 9, *Rama-kotayya v. Sundararamayya*. (Art. 144 will not apply where Art. 96 applies)
- (1937) A I R 1937 Nag 129 (130) : I L R (1937) Nag 254 : 171 Ind Cas 271, *Shankarsa v. Punam Chand*.
- (1923) A I R 1923 Oudh 185 (201) : 26 Oudh Cas 133 : 75 Ind Cas 626, *Zarif-un-nissa v. Sha fi-uz-zaman*.
- (1928) A I R 1928 Oudh 155 (188) : 108 Ind Cas 817, *Abdul Halim v. Saadat Ali*.
- (1918) A I R 1918 Pat 570 (573) : 47 Ind Cas 290 : 3 Pat L Jour 327, *Nathe Pujari v. Radha Binode Nath*.
- (1910) 8 Ind Cas 1095 (1095) : 33 All 221, *Ram Lakhnan Roy v. Gajadhar Rai*.
- (1911) 9 Ind Cas 300 (303) : 1911 Pun Re No. 26 (F B), *Sundar v. Shalig-ram*.
- (1912) 15 Ind Cas 10 (11) (All), *Bhole Singh v. Bhagwant Singh*.
- (1921) 64 Ind Cas 462 (464) (All), *Mt. Jagrani Misrani v. Mt. Sheo Dulari*.
- (1900) 4 Cal T. Jour 55 (55), *Dhanraj Chatterjee v. Kusum Kamini Devi*.

Itachargee v. Jagdish

- (1921) A I R 1921 All 389 (391) : 43 All 164 : 61 Ind Cas 546, *Mt. Ram Puri v. Budh Sen*
- (1897) 24 Cal 715 (719, 720), *Har Mohan Shaha v. Babural*
- (1905) 2 Cal L Jour 448 (457), *Ram Churn Teuara v. Protap Chandra Dutt*.
- (1907) 5 Cal L Jour 638 (640, 641), *Elokeshi Das v. Abinash Chandra Bose*. (Sale in execution void *ab initio* — Suit for possession of property is governed by Art. 144 and not by Art. 12.)
- (1922) A I R 1922 Cal 176 (177) : 70 Ind Cas 602, *Janakinath Saha v. Balkuntha Nath*. (Suit by auction-purchaser against trespasser — Art. 138 does not apply — Art. 144 applies.)
- (1915) A I R 1915 Lah 303 (305) : 29 Ind Cas 731, *Mahomed Bakhsh v. Balkishan*. (Objections to execution sale summarily rejected — Suit for recovery of property thus illegally sold — Art. 144 and not Art. 12 governs suit.)
- (1918) A I R 1918 Lah 330 (332) : 48 Ind Cas 399 : 1918 Pun Re No. 113, *Hira Singh v. Gulam Qadir*. (Minor not properly represented in suit—Decree—Sale of minor's property in execution — Suit by minor to set aside sale is governed by Art. 144 and not Art. 12)
- (1924) A I R 1924 Lah 326 (327) : 71 Ind Cas 822, *Azmi Khan v. Karim*. (Owner not party to decree—Sale under decree — Suit by owner to set aside sale and for possession is governed by Art. 144 and not by Art. 12.)
- (1925) A I R 1925 Lah 53 (54) : 79 Ind Cas 89, *Munna Lal v. Hamid Ali*.

- (1926) A I R 1926 Lah 238 (238) : 92 Ind Cis 980, *Narain Das v. Siraj-ud-din*. (Do)
- (1933) A I R 1933 Lah 91 (92) : 141 Ind Cas 401, *Mt. Radha v. Ajudhya Prashad*. (Do)
- (1933) A I R 1933 Lah 784 (786) : 14 Lah 791 : 148 Ind Cas 1143, *Mt. Ghulam Bibi v. Mt. Sariat Bibi* (Suit by heir of Mahomedan dying intestate, for recovery of his share—Art. 144 and not Art. 123 governs suit)
- (1929) A I R 1929 Lah 549 (550) : 117 Ind Cis 803 : 11 Lah 29, *Jano v. Narsing Das*. (Suit by Mahomedan co-heir for possession of his legal share is not governed by Art. 123 but by Art. 144)
- (1929) A I R 1929 Bom 141 (142) : 118 Ind Cas 785, *Bai Jiji v. Bai Dibanboo*. (Do.)
- (1914) A I R 1914 Oudh 369 (370, 371) : 17 Oudh Cas 157 : 24 Ind Cas 45, *Azz-ul-Hal v. Mariam Bibi*. (Do)
- (1920) A I R 1920 Mad 885 (889) : 42 Mad 673 : 51 Ind Cas 366, *Secretary of State v. Gulam Mahboob Khan* (Unlawful resumption of inam by Government — Suit for possession is governed by Article 144 and not Art. 14)
- (1926) A I R 1926 Mad 819 (850) : 92 Ind Cas 245, *Zamorin Rajah of Calicut v. Venkatagiri Pattar*. (Suit by lessor against lessee's assignee for recovery of property by reason of forfeiture — Art. 144 and not Art. 143 applies)
- (1916) A I R 1916 Pat 324 (324) : 35 Ind Cas 87, *Biswambar Lal v. Jhulan Ram Tewari* (Suit for possession — Arts 137 and 138 not applicable—Art. 144 applied)
- (1925) A I R 1925 Pat 216 (223) : 84 Ind Cas 586 : 4 Pat 139, *Ram Bachhya Singh v. Kamakhya Narain*.
- (1926) A I R 1926 Pat 421 (422) : 96 Ind Cas 632 : 6 Pat 73, *Ajodhya Prasad v. Ramkhehawan Singh* (Land not within estate partitioned)
- (1910)
- (1912) 15 Ind Cas 891 (396) : 15 Oudh Cis 111, *Bisheshar Tewari v. Bisheshar Dayal* (Art. 144 and not Art. 127 applies where the alleged joint family property has passed by sale to a stranger)
- (1905) 2 Cal L Jour 546 (550), *Ram Kannai Ghosh v. Harinarayan Singh*. (Transfer of trust property by a trustee to the knowledge of the transferee that the property is trust property—Suit by successor of the trustee—Art. 131, not Art. 144, applies)
- (1914) A I R 1914 Cal 733 (733) : 24 Ind Cas 216, *Abbas Dhal v. Masabdi Karikar* (Case falling within Art. 136—Arts 142 and 144 held not applicable)
- (1922) A I R 1922 Lah 166 (167) : 2 Lah 164 : 62 Ind Cas 791, *Jita Singh v. Man Singh*.
- (1926) A I R 1926 Lah 437 (438) : 96 Ind Cas 447 : 7 Lah 210, *Abdul Wahab v. Secretary of State* (Suit against Government—Art. 143 and not Art. 144, applies)
- (1932) A I R 1932 Pat 145 (146) : 11 Pat 165 : 142 Ind Cas 246, *Ram Prasad v. Bndeshwari Prasad*
- (1929) A I R 1929 Cal 250 (250) : 117 Ind Cas 593 : 56 Cal 616, *Biswanath Chakravarti v. Rabiya Khatun*
- [See also (1918) A I R 1918 Oudh 32 (53) : 21 Oudh Cas 1 : 44 Ind Cas 868, *Bisheshar Baksh Singh v. Rameshar Baksh Singh*
- (1937) A I R 1937 Oudh 373 (376) : 168 Ind Cas 593, *Chandrasekar Baksh v. Dhola Singh* (Suit in substance for possession of hereditary office—Art. 120 does not apply — Art. 121 or Art. 122 applies.)
- (1922) A I R 1922 Bom 211 (212) : 46 Bom 1009 : 70 Ind Cas 111, *Das Renu v. Valimohamed* (Suit by a subsequent trustee to recover property alienated by the former trustee in breach of trust is governed by Art. 131 and not by Art. 142)]

Arts. 142 & 144 is applicable to a particular case, Article 144 cannot be applied to
Note 2

- (1886) 12 Cal 594 (596, 597), *Azam Bhuyan v. Faizuddin Ahmed*. (Do.)
- (1929) A I R 1929 Cal 93 (95) : 114 Ind Cas 189, *Shiva Prasad Saw v. Bhadrmoni Dass*. (Do.)
- (1918) A I R 1918 Mad 469 (480) : 41 Mad 75 : 42 Ind Cas 245 (F B), *Vaidyanatha v. Savithri Ammal*. (Do.)
- (1902) 25 Mad 507 (510, 511, 512) : 12 Mad L Jour 119, *Seshamma Shet-tati v. Chichaya Hegade*.
- (1926) A I R 1926 Mad 181 (181) : 91 Ind Cas 454, *Kuppuswami Mudaliar v. Chockalainga Mudaliar*.
- (1931) A I R 1931 Mad 707 (710) : 51 Mad 893 : 135 Ind Cas 9, *Rama-hotayya v. Sundararamayya*. (Art. 144 will not apply where Art. 96 applies.)
- (1937) A I R 1937 Nag 129 (190) I L R (1937) Nag 254 : 171 Ind Cas 271, *Shankarsa v. Punam Chand*.
- (1923) A I R 1923 Oudh 185 (201) : 26 Oudh Cas 133 : 75 Ind Cas 626, *Zarif-un-nissa v. Shaft-us-zaman*.
- (1928) A I R 1928 Oudh 155 (188) 103 Ind Cas 817, *Abdul Halim v. Saadat Ali*.
- (1918) A I R 1918 Pat 570 (573) : 47 Ind Cas 290 : 3 Pat L Jour 327, *Nathe Pujari v. Radha Dinode Nash*.
- (1910) 8 Ind Cas 1035 (1095) : 33 All 224, *Ram Lakhan Roy v. Gajadhar Rai*.
- (1911) 9 Ind Cas 300 (303) : 1911 Pun Re No. 26 (F B), *Sunder v. Shaligram*.
- (1912) 15 Ind Cas 10 (11) (All), *Bhole Singh v. Bhagwant Singh*.
- (1921) 64 Ind Cas 462 (464) (All), *Mt. Jagrani Misran v. Mt. Sheo Dulari*.
- (1906) 4 Cal L Jour 56 (60), *Ramanath Chatterjee v. Kusum Kamini Debi*. (Art. 144 will not apply where Art. 127 applies.)
- (1897) 1 Cal W N 543 (544), *Umesh Chandra Bhattacharjee v. Jagdish Chandra Bhattacharjee*. (Do.)
- (1921) A I R 1921 All 389 (391) : 43 All 164 : 61 Ind Cas 546, *Mt. Ram Piar v. Budh Sen*.
- (1897) 24 Cal 715 (719, 720), *Har Mohan Shaha v. Baburahi*.
- (1905) 2 Cal L Jour 448 (457), *Ram Churn Tewari v. Protap Chandra Dutt*.
- (1907) 5 Cal L Jour 638 (640, 641), *Eloheshi Dasi v. Abinash Chandra Bose*. (Sale in execution void *ab initio* — Suit for possession of property is governed by Art. 144 and not by Art. 12.)
- (1922) A I R 1922 Cal 176 (177) : 70 Ind Cas 602, *Janakinath Saha v. Baskuntha Nath*. (Suit by auction-purchaser against trespasser — Art. 138 does not apply — Art. 144 applies.)
- (1915) A I R 1915 Lah 303 (305) : 29 Ind Cas 731, *Mahomed Balkhsh v. Balkhshan*. (Objections to execution sale summarily rejected — Suit for recovery of property thus illegally sold — Art. 144 and not Art. 12 governs suit.)
- (1918) A I R 1918 Lah 322 (323) : 40 Ind Cas 600 : 30 Ind Cas 600
- (1922) A I R 1922 Lah 447 (448) : 67 Ind Cas 517, *Alam Din v. Allah Dad*. (No proper guardian appointed in execution proceedings against minor—Sale concluded—Suit to set aside sale by minor is governed by Art. 144 and not Art. 12.)
- (1924) A I R 1924 Lah 396 (397) : 71 Ind Cas 822, *Azim Khan v. Karim*. (Owner not party to decree—Sale under decree — Suit by owner to set aside sale and for possession is governed by Art. 144 and not by Art. 12.)
- (1925) A I R 1925 Lah 53 (54) : 79 Ind Cas 29, *Munna Lal v. Hamid Ali*.
- (1923) A I R 1923 Lah 324 (325) : 40 Ind Cas 600 : 30 Ind Cas 600

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- (1926) A I R 1926 Lah 238 (238) : 92 Ind Cas 950, *Narain Das v. Siraj-ud-din*. (Do)
- (1933) A I R 1933 Lah 91 (92) : 141 Ind Cas 401, *Mt Radha v. Ajudhia Prashad*. (Do)
- (1933) A I R 1933 Lah 784 (786) : 14 Lah 791 : 148 Ind Cas 1143, *Mt. Ghulam Biba v. Mt. Sarwar Biba*. (Suit by heir of Mahomed in dying intestate, for recovery of his share—Art. 144 and not Art. 123 governs suit)
- (1929) A I R 1929 Lah 549 (550) : 117 Ind Cas 803 : 11 Lah 29, *Jano v. Narasing Das*. (Suit by Mahomed in co heir for possession of his legal share is not governed by Art. 123 but by Art. 144)
- (1929) A I R 1929 Bom 141 (142) : 118 Ind Cas 785, *Bai Jis v. Bai Bibanboo*. (Do)
- (1914) A I R 1914 Oudh 369 (370, 371) : 17 Oudh Cas 157 : 24 Ind Cas 45, *Aziz-ul-Hal v. Mariam Biba*. (Do)
- (1920) A I R 1920 Mad 885 (889) : 42 Mad 673 : 51 Ind Cas 366, *Secretary of State v. Gulam Mahboob Khan* (Unlawful re-umption of inam by Government—Suit for possession is governed by Article 144 and not Art. 14)
- (1926) A I R 1926 Mad 819 (850) : 92 Ind Cas 245, *Zamorin Rajah of Calicut v. Venkatayya Pattar*. (Suit by lessor against lessee's assignee for recovery of property by reason of forfeiture—Art. 111 and not Art. 143 applies)
- (1916) A I R 1916 Pat 324 (324) : 35 Ind Cas 87, *Biswambar Lal v. Jhulan Ram Tewari*. (Suit for possession—Arts. 137 and 138 not applicable—Art. 144 applied)
- (1925) A I R 1925 Pat 216 (224) : 84 Ind Cas 586 : 4 Pat 139, *Ram Bakhya Singh v. Kamakhya Narain*.
- (1926) A I R 1926 Pat 421 (422) : 96 Ind Cas 632 : 6 Pat 73, *Ajodhya Prasad v. Ramkhelawan Singh*. (Land not within estate partitioned and allocated to one person—Rightful owner's suit for possession, not falling under Art. 14—Art. 144 applies.)
- (1910) 5 Ind Cas 273 (275) (VII), *Gajadhar Ras v. Ramlakhan Ras*. (Suit held governed by Art. 144 as Art. 137 did not apply)
- (1912) 15 Ind Cas 394 (396) : 15 Oudh Cas 111, *Bisheshar Tewari v. Bisheshar Dayal*. (Art. 144 and not Art. 127 applies where the alleged joint family property has passed by sale to a stranger)
- (1905) 2 Cal L Jour 546 (550), *Ram Kannas Ghosh v. Harinarayan Singh*. (Transfer of trust property by a trustee to the knowledge of the transferee that the property is trust property—Suit by successor of the trustee—Art. 134, not Art. 144, applies.)
- (1914) A I R 1914 Cal 783 (783) : 21 Ind Cas 216, *Abbas Dhal v. Masabdi Karikar*. (Case falling within Art. 136—Arts. 142 and 144 held not applicable.)
- (1922) A I R 1922 Lah 166 (167) : 2 Lah 164 : 62 Ind Cas 794, *Jita Singh v. Man Singh*.
- (1926) A I R 1926 Lah 437 (439) : 96 Ind Cas 447 : 7 Lah 210, *Abdul Wahab v. Secretary of State* (Suit against Government—Art. 149 and not Art. 144, applies)
- (1932) A I R 1932 Pat 145 (146) : 11 Pat 165 : 142 Ind Cas 246, *Ram Prasad v. Dindeshwari Prasad*.
- (1929) A I R 1929 Cal 250 (250) : 117 Ind Cas 593 : 56 Cal 616, *Biswanath Chakravarti v. Rabija Khatun*.
[See also (1918) A I R 1918 Oudh 82 (53) : 21 Oudh Cas 1 : 44 Ind Cas 368, *Bisheshar Balsh Singh v. Rameshar Balsh Singh*]
- (1937) A I R 1937 Oudh 373 (376) : 169 Ind Cas 593, *Chandrika Balsh v. Bhola Singh*. (Suit in substance for possession of hereditary office—Art. 120 does not apply—Art. 121 or Art. 144 applies)
- (1922) A I R 1922 Bom 211 (212) : 46 Bom 1009 : 70 Ind Cas 912, *Bai Reva v. Valimahomed*. (Suit by a subsequent trustee to recover property alienated by the former trustee in breach of the trust is governed by Art. 134 and not by Art. 142)

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Note 2

it.² Where, therefore, the question arises whether Article 142 or Article 144 applies to a particular case, it must first be decided whether Article 142 applies to it and it is only when it is clear that it is *not* applicable, that Article 144 should be applied.

Now Article 142 applies only where the plaintiff, while in possession, *has been dispossessed or has discontinued his possession*.^{2a} A person can be said to be dispossessed or to discontinue his possession only when another person *enters on the property* in the possession of the plaintiff, and such *entry itself* is adverse to the former, that is, in contravention of his title.³ Where the plaintiff is not in possession at all but gets a title to it while the defendant is in lawful possession of it, it cannot be said that the defendant has made any entry on the property while in the possession of the plaintiff in contravention of the latter's title. It is not a case of the plaintiff being dispossessed or discontinuing his possession. Article 142 will not apply to such a case, the Article applicable would be Article 144 if no other specific Article is applicable to it. Thus, where *A* transfers his property to *B* but fails to deliver possession to him and *B* consequently sues *A* for possession, the case is not one under Article 142 and consequently Article 144 may apply.⁴ See also the undermentioned cases.^{4a} Again,

2. (1934) A I R 1934 All 993 (995) 152 Ind Cas 1. 57 All 278 (F B), *Bmdhya Chal Chand v. Ram Gharib*.

2a. (1932) A I R 1932 P C 55 (55) : 59 Ind App 130 : 11 Pat 272 : 136 Ind Cas 798 (P C), *Bageshwari Charan v. Jagannath Kuari*.

3. See Notes, *infra*

See also (1912) 17 Ind Cas 606 (608) . 8 Nag L R 163, *Kanhayyalal v. Dular Singh*. (Art. 142 will not apply unless possession of defendant is adverse, nor will Art. 144 apply.)

(1928) A I R 1928 Oudh 155 (188) : 108 Ind Cas 817, *Abdul Halim Khan v. Saadat Ali Khan*.

(1931) A I R 1931 P C 186 (188) : 130 Ind Cas 815 . 10 Pat 407 : 58 Ind App 20 (P C), *Nageshwar Dux Roy v. Bengal Coal Co., Ltd.* (Adverse possession may imply dispossession.)

4. (1911) 12 Ind Cas 431 (431, 432) (Lah), *Nauaz v. Muhammad Ahsan*.

(1922) A I R 1922 All 410 (411) : 77 Ind Cas 113, *Surat Singh v. Umrao Singh*. (Suit for property got under compromise)

(1924) A I R 1924 Cal 394 (394) : 81 Ind Cas 675, *Annada Mohon Roy v. Kina Das*.

(1930) A I R 1930 Lah 914 (915) : 129 Ind Cas 699, *Ramchand v. Gopal Singh*. (Suit for possession and partition of share in joint property by purchaser at auction sale, following symbolical possession)

(1908) 31 Mad 51 (53, 54) : 3 Mad L Tim 241, *Mogera Nandi v. Parameshwar*.

(1920) A I R 1920 Nag 199 (200) : 56 Ind Cas 929, *Mt. Gajbhai v. Nil Kanth*.

(1933) A I R 1933 Oudh 363 (365) : 147 Ind Cas 430, *Param Sukh v. Sheo Morat*. (Suit by lessee for possession of property leased)

(1930) A I R 1930 Oudh 310 (311) . 126 Ind Cas 703, *Yakub Khan v. Sheo Dulary*.

[See also (1876) 25 Suth W R 521 (523), *C. G. D. Betts v. Mohamed Ismail*. (A suit for possession of land got under a compromise in a former suit)]

(1907) 10 Oudh Cas 17 (20), *Karim Balsh Khan v. Mehdi Hasan Khan*. (Suit for property got under compromise)]

4a. (1922) 16 Bom 172 (177), *Hanmant Ramchandra v. Dabaji Abaji*. (Suit for possession by creditor entitled to it on default of payment by debtor —Art. 141 applies.)

where the plaintiff is in possession and the defendant has entered on the property, but such entry is under right *derived from the plaintiff*, or is *permissive*, or is otherwise *consistent with the title* of the plaintiff, it cannot be said that the *entry itself* is in contravention of the plaintiff's title, though by reason of subsequent events, his possession may *become adverse* to the plaintiff. Article 142 will not apply to this case also and consequently Article 144 may apply.⁵

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Note 2

The test therefore to see whether Article 142 applies to a particular case is to ascertain whether the defendant entered on the property while the plaintiff was in possession and whether such entry was *from the beginning* adverse to the plaintiff.^{5a}

In order to ascertain this, it is necessary to consider the *facts and circumstances admitted or proved in the case*. Where the plaintiff himself alleges possession and dispossession, it may generally be sufficient to bring the case under Article 142,⁶ unless the facts show

(1885) 1885 Pun Re No 36, *Sheoji v. Dhan Singh* (When defendant came on the land, it was not in contravention of plaintiff's title as owner as plaintiff got his title only later)

(1915) A I R 1915 Mad 539 (539, 540) 25 Ind Cas 692, *Venkataram v Venkataramiah* (Art 141 applies to a suit by an adopted son for the recovery of immovable property, the starting point is the date of his adoption)

5. (1928) A I R 1928 Cal 582 (583) 117 Ind Cas 532, *Monmothanath v. Bepin Behary*. (Permissive possession at the start)

(1887) 1887 All W N 91 (91), *Dalip Singh v. Tulshiram*. (A suit for the recovery of immovable property against a benami purchaser who denies the title of the real purchaser is governed by Art 144)

(1931) 1931 M W N 856 (856), *Lakshminarayana Narada v Madappayya* (In 1910, an agent of the plaintiff granted a lease of the plaintiff's property treating it as his own. In 1915 plaintiff knew about the lease. The agency terminated in 1922 and this suit was brought in 1925 for possession of the leased property. *Held*, that there being no question of possession and dispossession Article 142 does not apply)

(1926) A I R 1926 Mad 849 (850) 92 Ind Cas 245, *Zamorin Raja of Calicut v. Venkatagiri Pattar*.

(1938) A I R 1938 Mad 8 (11) I L R (1938) Mad 220 175 Ind Cas 535, *Sitamma v Sitapatirao* (Widow and adopted son living together — Possession and management by son of stridhana property of widow, not adverse to widow — Son's wife collecting rents exclusively after widow's death—Suit by heir of widow for possession—Art 144 applies)

(1928) A I R 1928 Oudh 155 (188) 108 Ind Cas 817, *Abdul Halim v Saadat Ali*

(1933) A I R 1933 Cal 102 (108) 140 Ind Cas 797, *Zamuddin Hossain v. Md Abdul Rahim*

(1939) A I R 1939 Nag 7 (9), *Maheban Lalli Pinjara v Yusufkhan Kallu Pinjara* (Defendant's possession was by transfer from plaintiff and not against his will—No dispossession)

[But see (1919) A I R 1919 Cal 1027 (1027) 46 Ind Cas 895, *Mohendra Nath Sow v Rajani Kanta Sow* (Plaintiff in possession of patni by receipt of services from chaukidars—Latter refusing to vacate on resumption—*Held* it was a case of dispossession)]

5a (1912) 17 Ind Cas 606 (608) 8 Nag L R 163, *Kanhayyalal v. Dular Singh*.

G (1935) A I R 1935 All 774 (775) 155 Ind Cas 824, *Baboo Singh v Ram Manohar*

(1890) 14 Bom 458 (462), *Faki Abdulla v. Dabaji Gangaji*.

(1905) 29 Bom 480 (489) 7 Bom L R 497, *Baluant Ramchandra v. Secretary of State*

Arts. 142 & 144 that there could not have been a dispossession or discontinuance of
Note 2

- (1868) 5 Bom H C R A C 139 (142), *Lalchand Ambaidas v. Sakharam*.
 (1872) 9 Bom H C R 53 (59), *Lakshmbai v. Vithal Ramchandra*.
 (1908) 10 Bom L R 571 (572), *Bhagwansingh v. Secretary of State*.
 (1910) 8 Ind Cas 639 (643) : 12 Bom L R 956 (968, 969) : 35 Bom 79, *Vasudeo Atmaram v. Eknath Balkrishna*.
 (1938) A I R 1938 Bom 210 (212) : 175 Ind Cas 93, *Naru Shidu v. Krishna Shidu*.
 (1872) 17 Suth W R 505 (507), *Bhromar Coomar Debee v. Danse Madhub Banerjee*.
 (1876) 25 Suth W R 217 (217), *Mt. Dhorjobutty Chowdhram v. Chamroo Mundul*.
 (1877) 26 Suth W R 103 (106), *Hurruck Narain Thacoar v. Mt. Lutchem Koer*.
 (1916) A I R 1916 Cal 582 (592) : 31 Ind Cas 965, *Krishen Doyal Gw v. Irshad Ali Khan*.
 (1922) A I R 1922 Cal 557 (558) : 67 Ind Cas 673, *Rakhal Chandra v. Durga Das*.
 (1924) A I R 1924 Cal 855 (857) : 51 Cal 669 : 78 Ind Cas 679, *Suresh Chandra v. Shrikanta*.
 (1927) A I R 1927 Cal 365 (367) : 100 Ind Cas 866, *Kalpada Basu v. Fort Gloster Jute Manufacturing Co. Ltd.*
 (1938) A I R 1938 Cal 160 (151) : 174 Ind Cas 511, *Guru Charan Rudra Pal v. Mafjuddin Molla*.
 (1938) A I R 1938 Cal 206 (209) : 175 Ind Cas 247, *Ramendra Prosad Basu v. Barada Prosad Basu*.
 (1933) A I R 1933 Lah 627 (628) : 143 Ind Cas 428, *Sheru v. Sham Singh*.
 (1935) A I R 1935 Lah 507 (508) : 157 Ind Cas 399, *Kuar Sam v. Gulab*.
 (1935) A I R 1935 Mad 947 (952) : 158 Ind Cas 854, *Venkataratnam v. Venkataratnam*.
 (1917) A I R 1917 Nag 7 (13) : 14 Nag L R 82 : 43 Ind Cas 913, *Ganno v. Beni*.
 (1928) A I R 1928 Oudh 348 (351) : 110 Ind Cas 180, *Milap Chand v. Mt. Mohini Bibi*.
 (1935) A I R 1935 Oudh 88 (89) : 153 Ind Cas 871 : 10 Luck 513, *Ram Shankar v. Sheo Dutt*.
 (1935) A I R 1935 Oudh 425 (426) : 156 Ind Cas 92, *Wahid Ali v. Mahboob Ali Khan*.
 (1924) A I R 1924 Pat 616 (617) : 3 Pat 673 : 81 Ind Cas 405, *H. Mathewson v. Secretary of State*.
 (1925) A I R 1925 Pat 68 (93) : 93 Ind Cas 451 (F B), *Harishar Prasad v. Kesho Prasad*.
 (1925) A I R 1925 Pat 376 (378) : 86 Ind Cas 618, *Lachmi Narain v. Rebbati Debba*.
 (1925) A I R 1925 Pat 625 (631) : 4 Pat 510 : 87 Ind Cas 849 : 88 Ind Cas 141, *Hastendra Singh v. Rameshuvar Singh*.
 (1916) A I R 1916 Low Bur 131 (131, 132) : 41 Ind Cas 722, *Appan Charan v. Kyause Ma Ma*.
 (1909) 1 Ind Cas 901 (901) (Mad), *Venkatarayudu v. Santharayya*.
 (1909) 2 Ind Cas 331 (333) (Cal), *Lalu Sahu v. Ghunaria Uraon*.
 (1911) 11 Ind Cas 521 (522) (Lab), *Ghulam Rasul v. Umar*.
 (1912) 15 Ind Cas 10 (11) (All), *Bhole Singh v. Bhagwant Singh*.
 (1913) 22 Ind Cas 64 (65) (Cal), *Dishambhar Salbhaya v. Nadiar Chand Mandal*.

possession in the sense in which the expression is used in Art. 142.^{6a} But the fact that the plaintiff does not allege dispossession in his plaint cannot render Article 142 inapplicable if the facts show that the defendant must have entered on the land in the possession of the plaintiff and that such entry must have been adverse from the beginning.⁷ The plaintiff cannot, by framing a suit as if there was no

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Note 2**

- (1934) A I R 1934 All 993 (997) . 152 Ind Cas 1 57 All 278 (F B), *Bindhya Chal Chand v Ram Gharib*.
- (1890) 1890 Bom P J 175 (175), *Zusia Francis v Manoel Gustin Fernan*.
- (1935) A I R 1935 Lah 507 (508) : 157 Ind Cas 399, *Kaur Sain v. Gulab*.
- (1935) A I R 1935 Oudh 214 (215) : 177 Ind Cas 52, *Manzoor Ali Khan v. Pateshwari Prasad*.
- (1933) A I R 1933 Rang 48 (48, 49) : 144 Ind Cas 274, *Ma Hme Ni v. Ma Hmice Yan U*.
- [See also (1929) A I R 1929 Bom 14 (19) 53 Bom 12 115 Ind Cas 369, *Sayaji Rao Gaekwar v. Madhavrao*.
- (1919) A I R 1919 Lah 133 (183) 50 Ind Cas 762 . 1919 Pun Re No. 117, *Chanan Mal v. Mela Ram*]
- Ca. See (1929) A I R 1929 Cal 297 (297) . 56 Cal 914 119 Ind Cas 289, *Gaya Prasad v. Balya Mani Das* (Plaintiff alleged dispossession—But facts showed no dispossession—Art. 144 was applied.)
7. (1911) 9 Ind Cas 554 (555) (Cal), *Bailash Chandra v. Amjud Ali* (7 Cal 225, Followed)
- (1937) A I R 1937 Nag 129 (129, 130) I L R (1937) Nag 254 171 Ind Cas 271, *Shankarsa v Punam Chand*.
- (1925) A I R 1925 Oudh 42 (44) 27 Oudh Cas 130 . 79 Ind Cas 964, *Gur Sahaj Kandu v. Chhed*.
- (1931) A I R 1931 Oudh 177 (229) : 136 Ind Cas 642, *Mahomed Asim Khan v. Mahomed Saadat Ali Khan*
- (1934) A I R 1934 All 933 (1001) . 57 All 278 152 Ind Cas 1 (F B), *Bindhya-chal Chand v Ram Gharib*.
- (1935) A I R 1935 All 964 (965) 159 Ind Cas 521, *Gurcharan Prasad v Jas Naram Singh* (Defendants planting trees on land—Suit for possession and removal of trees—Art. 142 applied)
- (1915) A I R 1915 Bom 92 (93) 39 Bom 335 28 Ind Cas 24, *Subappa v. Venkappa*.
- (1891) 18 Cal 642 (646), *Kartick Chunder v Saroda Sundari Debi*.
- (1926) A I R 1926 Cal 1166 (1167) 97 Ind Cas 1003, *Birendra Nath Roy v. Satis Chandra*.
- (1935) A I R 1935 Cal 228 (229), *Jnanana Prasanna v. Hemendranath*.
- (1927) A I R 1927 Lah 236 (236) 100 Ind Cas 477, *Kanshi Ram v. Taja*.
- (1919) A I R 1919 Pat 207 (210) 51 Ind Cas 801 4 Pat L Jour 463, *Bhikhad Bhunjan v Upendra Nath*
- (1933) A I R 1933 Rang 413 (416) 149 Ind Cas 1120, *Tun Mra Lung v Ma Ali Mra* (Where plaintiff alleges that he is owner of certain piece of land but the defendant is proved or admitted to be in possession of it for a long time, and that not with the leave and license of the plaintiff, a suit for possession is governed by Art 142 and not Art 144)
- (1910) 8 Ind Cas 639 (642) . 35 Bom 79, *Vasudeo Atmaram v Eknath Balakrishna*
- (1939) A I R 1939 Nag 7 (9), *Maherban Lalli Pinjara v Yusufkhan Kallu Pinjara* (Dispossession can be established by admissions or by the facts proved)
- [See also the following cases :
- (1890) 14 Bom 458 (462), *Faki Abdulla v Babaji Gungaji*.
- (1926) A I R 1926 Lah 13 (14) 89 Ind Cas 995, *Ismail v. Ibrahim*.
- (1934) A I R 1934 Oudh 21 (23) 147 Ind Cas 805, *Mahomed Mahmud v. Mahomed Afag*.
- (1912) 14 Ind Cas 295 (297) (Mad), *Prahlatai Parkum v Koram*.]

Arts. 142 & 144 dispossession, avoid the operation of Article 142.⁸

Note 2

An examination of the cases arising under the two Articles shows that the decisions are generally consistent with the test referred to above. There have, however, been several cases expressing a variety of views which are not consistent with the said test. Thus, it has been held that the applicability of Article 142 or Article 144 must be decided only with reference to the pleadings in the case,⁹ that Article 142 cannot apply in cases in which the plaintiff does not *allege* in his plaint his possession and dispossession,¹⁰ that Article 144

[But see (1884) 1884 Pun Re No. 40, *Muhammad Yar v. Ghulam*.
(Article 144 was applied—Submitted wrongly decided)]

(1927) A I R 1927 Lah 230 (230) : 100 Ind Cas 51, *Gangaram v. Hasan Shah*.]

8. (1930) A I R 1930 Lah 330 (331) : 126 Ind Cas 800, *Jumman v. Nihal Chand*.

9. (1926) A I R 1926 Cal 1166 (1167) : 97 Ind Cas 1003, *Birendra Nath Ray v. Satis Chandra*. (Per Cuming J.—To discover which is the correct Article applicable it is sufficient to look at the allegations in the plaint.)

(1935) A I R 1935 Lah 507 (508) : 157 Ind Cas 399, *Kaur Sam v. Gulab*.

(1932) A I R 1932 Oudh 46 (47) : 137 Ind Cas 678 : 7 Luck 250, *Suraj Bah v. Mahadeo Prasad*.

(1937) A I R 1937 Sind 226 (228) : 30 Sind L R 472 : 170 Ind Cas 621, *Wadeo Warisino v. Bhai Pursomal*.

10. (1927) A I R 1927 Lah 70 (70) : 98 Ind Cas 878, *Mt. Nawas Bai v. Ghulam Mohi ud din*.

(1925) A I R 1925 Mad 834 (835) : 87 Ind Cas 386, *Pera Jeeyanaraswami v. Mahomed Esoof Sahib*

(1926) A I R 1926 Oudh 313 (315) : 20 Oudh Cas 131 : 92 Ind Cas 825, *Sukhdeo v. Mt. Ram Dulari*

(1928) A I R 1928 Oudh 246 (247) : 103 Ind Cas 109, *Fakir Baksh Singh v. Prag Singh*. (A I R 1926 Oudh 313, Followed)

(1929) A I R 1929 Lah 596 (597) : 127 Ind Cas 8, *Mohammad Yar v. Mohammad Yar*.

(1934) A I R 1934 Oudh 21 (24) : 147 Ind Cas 805, *Mahomed Mahmud v. Mahomed Afag*.

(1934) A I R 1934 Pat 593 (593) : 152 Ind Cas 906, *Kanchan Tek v. Moga Mahton*.

(1926) 97 Ind Cas 135 (137) (Pat), *Mt. Dharichna Kuar v. Keshava Prasad Singh*.

(1916) A I R 1916 Low Bur 48 (49) : 8 Low Bur Rul 264 : 35 Ind Cas 432, *Aung Hla v. Ton Gyi*

(1934) A I R 1934 Lah 245 (247) : 144 Ind Cas 72, *Ali Akbar v. Rakha*.

(1934) A I R 1934 Lah 1019 (1020), *Dishambar Das v. Telu Ram*.

[See also (1933) A I R 1933 Lah 105 (106), 141 Ind Cas 234, *Raushan Ara Bijam v. Mahomed Beg*

(1915) A I R 1915 Bom 92 (93) : 39 Bom 335 : 28 Ind Cas 24, *Subbappa Shankareppa v. Venkappa Golappa*

(1925) A I R 1925 Nag 370 (370) : 87 Ind Cas 1023, *Singuri v. Gambhirji*.

(1931) A I R 1931 Nag 36 (39) : 30 Nag L R 234 : 148 Ind Cas 62, *Ganpatrao v. Vithabai*.

(1926) A I R 1926 Pat 577 (579) : 97 Ind Cas 282, *Kesho Prasad Singh v. Kirtarath*.

(1927) A I R 1927 Mad 287 (287) : 99 Ind Cas 312, *Ramanujachariar v. Sundarachariar*.

(1925) A I R 1925 All 454 (455) : 85 Ind Cas 578 : 47 All 369, *Ali Hammad v. Ghurpattar Singh*.

will apply to all cases based on *title* whether dispossession has also been alleged or not,¹¹ that Article 142 will not apply where the plaintiff was never in possession^{11a} and that where the defendant denies that the plaintiff was ever in possession, Article 142 cannot be applied.¹² It is submitted that none of these views can be accepted as correct on principle.

**Arts. 142 & 144.
Notes 2-3**

3. Suit must be for possession.—Articles 142 and 144 apply only to suits for possession.¹ In order that a suit may be one for possession it is necessary that there must be a prayer in the plaint

(1927) A I R 1927 Lah 171 (172) . 99 Ind Cas 642, *Faqir Mohammed v. Ramzan*.

(1930) A I R 1930 Lah 608 (609) . 122 Ind Cas 81, *Daulu Mal v. Ranaul Baksh*.

(1927) A I R 1927 Mad 1094 (1095) . 99 Ind Cas 971, *Kunhi Moidun v. Pakkar Kuttu*.

(1933) A I R 1933 Nag 274 (276) . 30 Nag L R 18 . 150 Ind Cas 679, *Mt. Jijibai v. Zabu*.

(1931) A I R 1931 Oudh 382 (384) . 134 Ind Cas 599, *Mt Zahida Begam v. Mumtaz Ali Khan*.

(1932) A I R 1932 Oudh 46 (47) . 137 Ind Cas 678 . 7 Luck 250, *Suraj Bali v. Mahadeo Prasad*.

(1932) A I R 1932 Oudh 122 (122) . 136 Ind Cas 256, *Mt Zahida Begam v. Mumtaz Ali Khan*.

(1935) A I R 1935 Pesh 133 (135) . 158 Ind Cas 968, *Mulla Ahmad v. Fazal Ahmad*.

(1916) A I R 1916 Low Bur 48 (49) : 35 Ind Cas 432 . 8 Low Bur Rul 264, *Aung Hla v. Ton Gyi*.

(1909) 3 Ind Cas 15 (17) (Cal), *Guru Das Kundoo v. Basanta Kumar Poy*.

(1929) 117 Ind Cas 334 (334) (Lah), *Hira Lal v. Lalji* .

11 (1929) A I R 1929 Lah 596 (597) . 127 Ind Cas 8, *Mahomed Yar v. Mahomed Yar*.

(1934) A I R 1934 Lah 576 (579) . 151 Ind Cas 490, *Harnam Singh v. Upender Chund*.

(1936) A I R 1936 Lah 530 (532) . 166 Ind Cas 684, *Ishar Das v. Ganpat Rai* . (A disposed of by B and property afterwards transferred to C—Suit by A against C—Art. 144 governs the case.)

(1925) A I R 1925 Oudh 246 (247) . 103 Ind Cas 109, *Faqui Baksh Singh v. Prag Singh*.

11a (1910) 8 Ind Cas 1095 (1095) . 33 All 224, *Ram Lakhnan Rai v. Gajadhar Rai*. (A disposed of—A's property purchased by B in court-auction—After

who entered into possession after B's death before he entered into possession—Art. 144 applied—Submitted wrong as the case is clearly one of dispossession as the heir must be deemed to have been in possession after B's death and before C's entry.)

12. (1934) A I R 1934 Pat 593 (595) . 152 Ind Cas 906, *Kanchan Teli v. Moga Mahton*.

Note 3

1. (1930) A I R 1930 Oudh 387 (395) . 164 Ind Cas 118, *Partap Bahadur v. Jagatjit Singh* . (Suit not for possession—Article 142 does not apply.)

(1931) A I R 1931 Pat 436 (437) . 133 Ind Cas 453, *Bairnath Jugal Kishore v. Manindra Chandra* . (Action for damages for trespass to mine and removing coal—Article 48 applies and not Article 142 or Article 144.)

Arts. 142 & 144
Note 3

for the dispossession of some one from the property claimed.² A suit for a mere declaration of right to property, for example, is not a suit for possession within the meaning of these Articles.³ In *Francis*

- (1923) A I R 1923 Lah 672 (673) : 72 Ind Cas 1040, *Khushi Muhammad v. Hayat*. (Property contracted to be transferred — Suit for recovery of property—Suit is one for specific performance of contract governed by Art. 113.)
- (1936) 163 Ind Cas 347 (349) (Cal), *Sarafuddin Nur Ahmad v. Jibannessa Khatoon*. (Do.)
- (1932) A I R 1932 Lah 24 (25) : 135 Ind Cas 203, *Mahbub v. Munshi*. (Do.)
- (1935) A I R 1935 All 569 (570) : 156 Ind Cas 894, *Suraj Patish Nandan v. Mt. Atul Bibi*. (Do.)
- (1908) 5 All L Jour 529 (531). 1908 All W N 245 : 4 Mad L Tim 445, *Charna v. Bans Lal*. (Do.)
- (1919) A I R 1919 Cal 589 (590) : 50 Ind Cas 908, *Jotirmoi Mouluk v. Khudiram Sadhu Khan*. (Art. 144 of the Limitation Act has no application to a suit for assessment of fair and equitable rent.)

2. (1897) 20 All 35 (36, 37) : 1897 All W N 193 (F B), *Francis Legge v. Rambaran Singh*.

(1931) A I R 1931 Mad 707 (710) : 54 Mad 883 : 135 Ind Cas 9, *Ramakotayya v. Sundararamayya*. (It is not appropriate to apply Article 144 to a suit which does not claim any specific immovable property but only compensation in shape of a share in the original property divided.)

(1917) A I R 1917 Mad 407 (407) : 35 Ind Cas 646, *Siddalinga Swamulu v. Ramachandracharulu*.

(1899) 2 Oudh Cas 79 (83), *Ashik Ali v. Mozhar Ali Khan*.

(1906) 9 Oudh Cas 292 (294), *Raja Mumtas Ali Khan v. Sarju Singh*.

3. (1898) 20 All 35 (36, 37) : 1897 All W N 193 (F B), *Francis Legge v. Rambaran Singh*. (Suit for declaration of right and for actual possession.)

(1930) A I R 1930 Bom 61 (63) : 54 Bom 4 : 124 Ind Cas 773, *Erishnafee v. Annafee*.

(1916) A I R 1916 Cal 751 (753, 754) : 31 Ind Cas 242, *Brajendra Kishore v. Bharat Chandra*.

(1910) 8 Ind Cas 639 (648) : 12 Bom L R 956 (971) : 35 Bom 79, *Vasudeo Atmaram v. Eknath Balkrishna*.

(1932) A I R 1932 Cal 842 (843) : 139 Ind Cas 759, *Nagendra Kishore v. Brojendra Kishore*.

(1928) 111 Ind Cas 376 (377) (Oudh), *Sant Balsh v. Ram Nath*. (When a suit is principally a declaratory suit based on title, it does not fall under Article 142 of Schedule I of the Limitation Act though the

(1899) 1899 Pun Re No 8, *Naram Singh v. Ishar Singh*. (When plaintiff does not himself seek possession, and the object of the suit is to place a third party in possession, it is only a suit for a declaration and not a suit for possession within the meaning of Article 142 or Article 144, Sch. II, Limitation Act (XV of 1877).)

(1904) 1 Cal L Jour 73 (78, 79), *Mohabbharat Shaha v. Abdul Hamid Khan*.

(1927) A I R 1927 Cal 80 (32) : 97 Ind Cas 635, *Abdul Gafur v. Abdul Jabbar*.

(1900) 20 All 35 (36, 37) : 1897 All W N 193 (F B), *Francis Legge v. Rambaran Singh*.

(1906) 9 Oudh Cas 292 (294), *Raja Mumtas Ali Khan v. Sarju Singh*.

(1930) A I R 1930 Bom 61 (63) : 54 Bom 4 : 124 Ind Cas 773, *Erishnafee v. Annafee*.

(1916) A I R 1916 Cal 751 (753, 754) : 31 Ind Cas 242, *Brajendra Kishore v. Bharat Chandra*.

(1910) 8 Ind Cas 639 (648) : 12 Bom L R 956 (971) : 35 Bom 79, *Vasudeo Atmaram v. Eknath Balkrishna*.

(1932) A I R 1932 Cal 842 (843) : 139 Ind Cas 759, *Nagendra Kishore v. Brojendra Kishore*.

Legge v. Rambaran Singh,⁴ where the plaintiff instituted a suit for the declaration of right to and of actual possession in immovable property, their Lordships of the Allahabad High Court observed as follows:

Arts. 142 & 144
Note 3

"The respondents seek on the other hand, to bring the suit, though expressly described as a suit for a declaration of right to, and of possession in, immovable property, under Article 144 which provides for suits for possession of immovable property or of any interest therein. It seems to us that there is the widest possible difference between a suit for a declaration such as is asked for in this suit and a suit for actual possession of immovable property. *In a suit to which Article 144 would apply, there must be a prayer express or implied, for the dispossession of some one from the property or from the interest in it which the suit claims.* In the present suit the plaintiffs have most distinctly asserted that they are, and have all along been, in possession of the property. There is no one to be dispossessed from it or from any interest in it."

Suits for possession must, under these Articles, be taken to mean suits in which possession is asked for as the *primary relief*. Where the primary relief asked for is something other than possession, and possession is asked as a consequence of the primary relief being granted, the Article governing the suit would be that appropriate to the primary relief and not Article 142 or Article 144. Thus, a suit for pre-emption is primarily to *set aside a competing right* with a consequential prayer for possession, and is therefore not governed by Article 144.⁵ On the same principle a suit for the redemption of a usufructuary mortgage involving a consequential prayer for possession is not governed by Article 144 but by Article 148.⁶ In *Janaki Kunwar v. Ajit Singh*,⁷ A had conveyed lands to B by a deed of sale. He subsequently filed a suit against B to have the deed of sale cancelled on the ground of fraud and undue influence, and, as a consequence, to have the property restored to him. It was contended that the suit was governed by the twelve years' rule of limitation. Their Lordships of the Privy Council negatived this contention in the following words:

"It was not a suit for possession of immovable property in the sense in which the limitation of twelve years is applicable. The immovable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced Their Lordships are clearly of opinion that

4. (1897) 20 All 35 (36, 37) 1897 All W N 193 (F B).

5. (1902) 24 All 17 (26) 28 Ind App 248 5 Cal W N 688 . 8 Sar 133 . 3 Bom L R 707 (P C), *Datui Begam v. Mansur Ali Khan*.

6. (1889) 14 All 1 (3) . 11 All 423 : 1891 All W N 211 (F B), *Ashfaq Ahmad v. Wazir Ali*.

7. (1887) 15 Cal 58 (65) 14 Ind App 148 5 Sar 92 . 12 Ind Jur 9 : R & J 99 (P C).

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Note 3**

the suit falls within Article 91 of the Act of 1877, and is therefore barred."

See also the undermentioned cases to a similar effect.⁸

Where the primary relief asked for is possession, the suit will be regarded as one for possession within the meaning of these Articles, even though some other prayer which is ancillary to the prayer for possession, or which the plaintiff is not bound to ask, is also asked for in the plaint. Thus, a suit for possession and mesne profits and for correction of an entry in the Record of Rights,⁹ or a suit for possession with an ancillary prayer for the removal of trees planted on the lands¹⁰ is a suit for possession governed by the twelve years' rule of limitation. Similarly, a suit for possession and for cancellation of a

8. (1929) A I R 1929 Mad 313 (317) : 118 Ind Cas 491, *Ramaswami v. Govindammal*.

(1937) A I R 1937 Cal 500 (504) : 172 Ind Cas 755, *Jafar Ali v. Nasiman-nessa Bibi*.

(1917) A I R 1917 Cal 610 (611) : 34 Ind Cas 188, *Krishna Dhona v. Bhagaban Chandra* (Sale by guardian being only voidable, the ward cannot get possession without getting sale set aside. Suit will be governed by Article 44 and not by Article 144.)

(1935) A I R 1935 Mad 1 (2) : 154 Ind Cas 616, *Anhanima v. Kameshwaramma*.

(1889) 11 All 456 (460) : 1889 All W N 109, *Hasan v. Nazo*. (A plaintiff cannot by calling a suit one for possession get behind a document which stands in his way and obtain possession without setting aside the document.)

ARTICLE 144

Suryanarayana v. Narayanaswamy (Ward's suit for possession of property alienated by guardian during minority is governed by Article 44 and not by Article 144.)

(1932) A I R 1932 All 108 (109) : 53 All 738 : 136 Ind Cas 71, *Ram Charitler Misr v. Suraj Teli*. (A suit by a minor after attaining majority against a certified guardian to set aside a fraudulent transfer is

(A
any
of

Section 1 of Act 14 of 1859 and not within Cl. 12)

(1919) A I R 1919 Pat 423 (424) : 52 Ind Cas 361, *Tafarul Khan v. Mahomed Bakshi Khan*.

(1895) 12 Cal 69 (74 to 75), *Raghubar Dyal Sahu v. Bhikya Lal Misser*.

9. (1919) A I R 1919 Pat 423 (424) : 52 Ind Cas 361, *Tafarul Khan v. Mahomed Bakshi Khan*.

[See also (1864) 1864 Sath W R (Gap) 79 (80), *John Grey v. Anundo Mohun Meistro*]

10. (1927) A I R 1927 Oudh 69 (90) : 99 Ind Cas 199, *Suchit v. Mahomed Habib Ullah*.

(1922) A I R 1922 Oudh 47 (48) : 66 Ind Cas 799, *Ghafur Khan v. Prag Narayan*.

document in a case in which the plaintiff is not bound to ask for such cancellation, would be governed by the limitation applicable to a suit for possession¹¹ See also the undermentioned cases¹²

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11. (1930) A I R 1930 Cal 748 (749) 132 Ind Cas 156, *Krishnadhan Laha v. Brojendra Nath*. (Void transfer of minor's property—Suit by minor for possession after setting aside transfer — Suit is governed by twelve years' rule)
- (1912) 16 Ind Cas 847 (848) (Lah), *Rupa Shah v. Irsad Ali*. (Do)
- (1929) A I R 1929 All 679 (881) 122 Ind Cas 680 52 All 110, *Dip Chand v. Munni Lal* (Do)
- (1883) 5 All 490 (491) 1883 All W N 64, *Ramausar Pandey v. Raghubar Jati*. (Do)
- (1922) A I R 1922 Lah 386 (387) 68 Ind Cas 731, *Sunder v. Shiaman*. (Do.)
- (1928) A I R 1928 Nag 151 (151) 107 Ind Cas 516, *Waman v. Vishnu*.
- (1884) 6 All 260 (262) : 1884 All W N 73, *Ikram Singh v. Intizam Ali*.
- (1902) 30 Cal 433 (439), *Banku Behari v. Krishno Gobindo*.
- (1893) 1893 Pun Re No 96, *Wazira v. Fattu*.
- (1852) 5 All 76 (79) : 1852 All W N 180, *Hazari Lall v. Jadaun Singh*. (Where, in a suit for possession, cancelling or setting aside an instrument is purely incidental in granting the relief of possession, the suit in its essence and substance is one for the recovery of immovable property and Art 144 and not Art 91 applies)
- (1878) 2 Cal L R 10 (12), *Trilochun Chattapadhyaya v. Nobokishore Ghutuck*. (A suit by an heir for possession of immovable property in the hands of a person under an alleged sale deed by the deceased and to set aside the deed, is governed by Art 144 and not by Art 91)
- (1916) A I R 1916 All 839 (840) 32 I. C 930, *Mt Bageshara v. Sheo Nath*.
- (1905) 8 Oudh Cas 191 (192), *Duarka v. Saluk*.
- (1909) 1909 Pun W R No 5, *Amir Shah v. Hasdar Shah*.
12. (1936) A I R 1936 Lah 996 (998) 167 Ind Cas 916, *Chhaju Mal v. Multan Singh*. (Alienation by manager — Suit by minor co-parceners on attaining majority for possession of property is governed by Art. 144 and not by Art 44 or Art. 91)
- (1934) A I R 1934 Lah 601 (602) 152 Ind Cas 633, *Kaka v. Fakir Chand*. (Do)
- (1915) A I R 1915 Bom 132 (134) 33 Ind Cas 441, *Anandappa v. Totappa*. (Do)
- (1915) A I R 1915 Lah 200 (202) 29 Ind Cas 199, *Radhu Ram v. Mohan Singh*
- (1916) A I R 1916 Lah 247 (248) 33 Ind Cas 943 1916 Pun Re No 83, *Sajjad Ali v. Muhammad Zulfikar Ali*
- (1894) 1894 Pun Re No 56, *Bhai Asa Ram v. Attar Singh*
- (1888) 1888 All W N 256 (257), *Sheo Sahai v. Muhammad Askari*.
- (1911) 12 Ind Cas 140 (145) (Lah), *Muhammad Umar Ali v. Aman Ali*
- (1928) A I R 1928 Mad 1216 (1253 1254) 114 Ind Cas 626, *Secretary of State v. Abdul Rahim* (Dispossession by public servant — Suit for possession—Order of public servant not necessary to be set aside — Art 14 does not apply but Art 144 governs the suit)
- (1924) A I R 1924 Mad 607 (607) 78 Ind Cas 564, *Kanna Panikkar v. Nanchan*
- (1911) 11 Ind Cas 76 (77) 1912 Pun Re No 15, *Saif-ud-din v. Hansraj*.
- (1932) A I R 1932 Lah 47 (48) 131 Ind Cas 119, *Abdul Rahman v. Mt. Chhaju* (Suit for ejectment of non-proprietor in the Punjab from his site is governed by Art 144 and not by Art 120)
- (1926) A I R 1926 Cal 910 (911) 94 Ind Cas 842, *Keshab Lal v. Bholanath* (A suit which is in essence one for declaration of title and recovery of possession is not governed by Art 148 but by Art 144)
- (1901) 3 Bom L R 682 (684), *Baiwantrao v. Ramkrishna*.
- (1922) A I R 1922 Mad 369 (371) 70 Ind Cas 317, *Lunga Munisami Reddi v. Govindasami Naicken* (Suits by some coparceners for possession of property sold by other coparceners are governed by Art 144 and not by Art. 127.)

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Note 3**

It is not always the form of the relief claimed that will determine the real character of the suit.¹³ The question in each case is what in substance the plaintiff claims. Where A claimed to be a trustee of a *mutt* and as such entitled to possession and prayed that he might be enabled to collect the rents and profits from the hands of a Receiver appointed by the Court, it was held that the suit was one for possession within the meaning of these Articles.¹⁴ A suit for a declaration that a pathway was a public pathway and for an injunction to remove an obstruction thereto was regarded as a suit for possession within the meaning of Article 144.¹⁵ A suit for removal of beams constructed by the defendants in such a manner as to overhang the plaintiff's land, was regarded as a suit for possession governed by the twelve years' period of limitation.¹⁶ See also Note 67 *infra* and the under-mentioned cases.¹⁷

(1895) 1895 Pun Re No. 52, *Hafiz Karim Baksh v. Mt. Begam Jan.*

(1893) 16 Mad 311 (316). 3 Mad L Jour 144, *Sundaram v. Seethammal.* {Substantial relief claimed recovery of land and not cancellation of the deed obtained by fraud — Article applicable is Art. 144 and not Art. 91.}

(1917) A I R 1917 Mad 254 (255) : 33 Ind Cas 436, *Velligonda Reddy v. Andra Narayya.* (Art. 144 and not Art. 44 applies in the case of transfer of minor's property by authorised or *de facto* guardian which is void *ab initio*.)

(1918) A I R 1918 Mad 1038 (1039) : 40 Ind Cas 418, *Thirupathi Raju v. Venkata Raju.*

(1914) A I R 1914 Mad 698 (700) : 24 Ind Cas 246, *Kunhanna Shetty v. Timmaju.* (Suit by *ahiyasanthana* family to recover properties alienated by *ejaman*, not being a suit to set aside an instrument, is governed by Art. 144 and not by Art. 91.)

(1935) A I R 1935 Mad 709 (712) : 158 Ind Cas 121, *Chennamma v. Mangamma.*

(1890) 1890 All W N 115 (116), *Ajuba Begam v. Nazir Ahmad.* (Alienation by one heir not binding on another.—Suit by latter against alienee for possession not governed by Art. 91, but by the 12 years' rule.)

(1908) 35 Cal 551 (560) : 35 Ind App 98 : 10 Bom L R 590 : 5 All L Jour 290 : 12 Cal W N 562 : 7 Cal L Jour 528 : 14 Bur L R 108 : 18 Mad L Jour 277 : 4 Mad L Tim 12 : 4 Low Bar Rul 266 (P C), *Petherperumal Chetty v. Muniandy Serian.*

(1920) A I R 1920 Pat 538 (539) : 58 Ind Cas 380, *Ram Brich Singh v. Mt. Sonjhari Koer.*

(1907) 11 Oudh Cas 346 (349), *Balbhaddar Singh v. Jawahir Singh.*

13. (1929) A I R 1929 Mad 813 (317) : 118 Ind Cas 481, *Ramaswami v. Govindammal.*

14. (1919) A I R 1919 P O 62 (68) : 43 Mad 253 : 46 Ind App 204 : 53 Ind Cas 239 (P C), *Arunachalam v. Venkatachalapathi.*

15. (1921) A I R 1921 Cal 405 (406) : 69 Ind Cas 910, *Harish Chandra v. Pran Nath.*

16. (1879) 1879 Bom P J 27, *Nahalehand v. Magan.*

17. (1934) A I R 1934 Bom 140 (143) : 151 Ind Cas 156, *Govindlal Maneklal v. Manekchowk Spinning and Weaving Mills Co.* (A suit for the recovery of possession of land on declaration of plaintiff's right thereto on the basis of an award cannot be regarded as a suit for the specific

A suit for possession does not invariably mean a suit for actual physical possession. It only means a suit for such possession as the property is capable of. In a suit for the recovery of certain endowed properties wrongfully alienated by one of the *vahivatdars*, which were in the possession of occupancy tenants, relief by way of actual possession was out of the question and the only relief that could be claimed was the right to collect the rents. Where in such a case the plaintiffs claimed a declaration that they were entitled to collect the rents and an injunction restraining the defendants from collecting them, it was held that the suit must be regarded as one for possession.¹³

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Notes 3-4

4. Suit on possessory title. — It is an important principle that possession by itself is a substantive right recognized by law and has legal incidents and advantages attached to it apart from the true owner's title.¹ It is a heritable and transferable right² and a person in possession can sue for a *declaration* of his right thereto or for an *injunction* as against any person threatening to infringe it.³ It is *prima facie* evidence of title against all persons except the true

(1935) A I R 1935 Mad 449 (452), *Rajagopala Naidu v. Ramasubramanyya Ayyar* (Suit for possession of office which is not hereditary — Article 120 applies)

(1900) 23 Mad 593 (596) : 10 Mad L Jour 208, *Sornattali Ammal v. Muthayya Sastrigal*. (Plaintiff declared entitled to certain land under award — Suit to recover by plaintiff is governed by Article 144, and not Article 113.)

(1927) A I R 1927 Nag 400(401) : 105 Ind Cas 286, *Narayan v. Laxman Rao*. (Suit by an owner for possession of his wall which has been deliberately encroached upon and built upon by the defendants is essentially one for possession, and the incidental fact that under the law applicable to such a case in India it is usual to give to the defendants an opportunity of removing the building, they have constructed on the land encroached upon, in no way makes the suit one for injunction)

18. (1933) A I R 1933 Bom 26 (29) : 141 Ind Cas 103, *Narayan Balwant v. Datatraya Ramchandra*.

Note 4

1. (1899) 23 Mad 179 (182), *Mustapha v. Santha*. (Citing Pollock and Wright on possession)

2. (1904) 27 All 169 (171) : 1 All L Jour 625 : 1904 All W N 222, *Pahlwan Singh v. Ram Bharose*.

(1907) 29 All 59 (60) : 3 All L Jour 775 : 1906 All W N 264, *Shri Gopal v. Ayesha* (Heritable right — But the heirs must have entered into possession and retained possession at the time of trespass by defendant.)

(1919) A I R 1919 All 43 (44) : 54 Ind Cas 308, *Dazmir Khan v. Rustam Khan* (Heritable)

(1878) 20 Suth W R 114 (115) : 11 Beng L R 237, *Brindaban Chunder Roy v. Tarachand Bindopadhyay*

(1930) A I R 1930 Lah 220 (220) : 117 Ind Cas 904, *Mt Mansa Devi v. Sansaru* (Heritable)

(1908) 11 Oudh Cas 337 (339, 340), *Wazir-un-nisa Degum v. Wazir Ali* (Do)

(1907) 1907 App Cas 73 (79) : 76 L J P C 19 : 95 L T 890 : 23 T L R 232, *Perry v. Glissold*

(1865) L R 1 Q B 1 (6) : 35 L J Q B 17 : 11 Jur (N S) 925 : 13 L T 254 : 14 W R 26, *Asher v. Whitlock*

(1877) 6 Ch D 696 (704, 705) : 46 L J Ch 572 : 25 W R 768, *Ex parte Winder*.

3 (1915) A I R 1915 Mad 29 (30) : 37 Mad 298 : 25 Ind Cas 894, *Ayyapparaju v. Secretary of State*.

Arts. 142 & 144 owner.* The following passage from Salmond on Jurisprudence may
Note 4 be usefully referred to in this connection :

"The possessor of a thing may be presumed to be the owner of it and may put all other claimants to proof of their title. . . . Even in respect of property already owned, the wrongful possession of it is a good title for the wrongdoer as against all the world except the true owner. Possession is of such efficacy also that a possessor may, in many cases, confer a good title on another even though he has none himself. . . . A wrongful

(1934) A I R 1934 Mad 274 (274) : 148 Ind Cas 631, *Ramalinga v. Anthonimulku* (Even though plaintiff himself was a trespasser.)

(1910) 6 Ind Cas 266 (266) 34 Mad 173, *Kondappa Rajan v. Suryanarayana*. (Enjoyment of a water course.)

(1891) 1891 Bom P J 128, *Janu v. Mahadu*.

[See also (1896) 20 Bom 798 (801), *Gangaram v. Secretary of State*.]

4. (1893) 20 Ind App 99 (106) 20 Cal 834 6 Sar 305 · 17 Ind Jur 321 (P C), *Ismail Ariff v. Mahomed Ghouse*.

(1900) 25 Bom 287 (303) : 2 Bom L R 1111, *Hanmantrav v. Secretary of State*.

(1906) 8 Bom L R 96 (98), *Hari v. Dhondi*. (Prior legal possession is evidence in itself of ownership.)

(1881) 7 Cal 591 (593) : 9 Cal L R 164, *Mohabeer Pershad Singh v. Mohabeer Singh*.

(1882) 9 Cal 130 (131) : 11 Cal L R 393 . 5 Shome L R 84, *Ertaza Hossein v. Bany Mistry*. (Prior possession is good title against dispossession.)

(1898) 5 Cal W N 234 (239), *Fazlar Rahman Chowdhry v. Raj Chunder Sen*. (Previous possession and decree in a previous suit negating the defendant's title is sufficient proof of plaintiff's title against defendant.)

(1867) 8 Suth W R 336 (367), *Khajjah Enaetoolla Choudhry v. Kishen Soonder Sarma*.

(1860) 12 Suth W R 472 (473), *Gour Paroy v. Wooma Sunduree Debia*.

(1917) A I R 1917 Cal 797 (798) : 35 Ind Cas 885, *Ram Kristo v. Narendra Kishore*.

(1922) A I R 1922 Cal 199 (199) : 50 Cal 23 : 74 Ind Cas 283, *Naba Kishore v. Pora Beua*.

(1930) A I R 1930 Cal 113 (124) : 123 Ind Cas 250 : 57 Cal 170, *Currimbhoy and Co. v. L. A. Creet*.

(1905) 28 Mad 69 (71), *Nawab Ajajuddin Ali Khan v. Secretary of State*.

(1925) A I R 1925 Nag 803 (364) · 87 Ind Cas 1000, *Deorao v. Pathal*.

(1929) A I R 1929 Nag 818 (319) · 119 Ind Cas 701, *Kasturchand Bhikamchand v. Almaran*.

(1933) A I R 1933 Nag 202 (204) : 142 Ind Cas 493 : 29 Nag L R 187, *Mt. Manju v. Gulab Rao*. (Possession can however ripen into prescriptive title after twelve years.)

(1933) A I R 1933 Nag 274 (276) : 150 Ind Cas 679 : 30 Nag L R 18, *Mt. Jyotsai v. Zabu*.

(1920) A I R 1920 Oudh 184 (190) : 119 Ind Cas 872, *Khushwaqt v. Jagannath Prasad*.

(1916) A I R 1916 Pat 172 (173) · 38 Ind Cas 797 : 2 Pat L Jour 61, *Hara-dhan Mandal v. Inwar Das*

(1920) A I R 1920 Pat 814 (415) 57 Ind Cas 320, *Ajundhya Singh v. Anudh Bihari Das*.

(1919) A I R 1919 Upp Bur 21 (22) · 50 Ind Cas 575 : 3 Upp Bur Rul 125, *Nga Tha Zan v. Sunder Singh*.

(1910) 6 Ind Cas 806 (808) (Cal), *Shama Charan Roy v. Surja Kantla*. (Doubting correctness of previous cases such as 26 Cal 279.)

(1912) 16 Ind Cas 599 (599) (Mad), *Venkatasubbiah v. Secretary of State*. (Rule holds good even against the Secretary of State)

possessor has the rights of an owner with respect to all persons except *earlier possessors* and except the true owner himself...⁵

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"Even a wrongdoer who is deprived of his possession can recover it from any person whatever simply on the ground of his possession. Even the true owner who retakes his own, may be forced to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession and then proceed in due course of law for the recovery of the thing on the ground of ownership. *The intention of the law is that every possessor shall be entitled to retain and recover his possession until deprived of it by a judgment according to law.*"⁶

A person who was in juridical possession but who was dispossessed by another person can, therefore, recover back the possession from such person, on the sole ground of his prior possession, except as against the true owner.⁷ The presumption of ownership arising from the present possession of the defendant will be met by the stronger

(1925) A I R 1925 Cal 635 (636) 86 Ind Cas 835, *Chaitra Nath v. Babar Ali* (Long possession without payment of rent may in certain circumstances justify the inference of rent-free title)

[See also (1936) A I R 1936 Bom 201 (208, 209, 212) 103 Ind Cas 632, *Govindbhai v. Dahanbhai*.

(1870) 4 Beng L R App 21 (23), *Tufani Singh v. Mt. Durgaban*.

(1907) 1907 App Cas 73 (79) 76 L J P C 19 95 L T 890 : 23 T L R 232, *Perry v. Chissold*.]

5. Salmond on Jurisprudence, 8th Edition, page 293.

6. Salmond on Jurisprudence, 8th Edition, pages 324, 325.

7. (1903) 5 Bom L R 225 (227), *Rajaram Tuljaram v. Nanchand Tuljaram*. (The possession of plaintiff must be juridical possession—Joint possession with defendant is of no avail)

(1887) 1887 All W N 55 (56), *Muhammad Yusuf v. Sukh Nath*.

(1914) A I R 1914 All 54 (55) 86 All 325 23 Ind Cas 532, *M. A. Gafoor Khan v. Secretary of State* (Vendee from vendor without title—Vendee can sue to eject trespasser.)

(1884) 8 Bom 371 (375), *Krishnarav Yeshwant v. V. Apaji Ghoti Kar*.

(1901) 3 Bom L R 246 (248), *Bas Faian v. Emad*.

(1908) 10 Bom L R 571 (573), *Bhagwan Singh Daulat Singh v. Secretary of State*

(1889) 1889 Bom P J 309, *Sakatchand Jetha v. Sundarlal Jetha*. (Section 9, Specific Relief Act, is no bar to such a suit.)

(1924) A I R 1924 Bom 178 (179) 77 Ind Cas 307, *Atmaram Bhula v. Balaji Raghunath* (Plaintiff in possession for over twelve years)

(1927) A I R 1927 Cal 931 (932) 100 Ind Cas 278, *Sm Gouribala Debi v. Probhas Chandra*.

(1930) A I R 1930 Cal 113 (124) 57 Cal 170 123 Ind Cas 250, *Currimbhoy and Co v. L. A. Creel*.

(1867) 8 Suth W R 386 (387), *Khajah Emaetoolah Chowdhry v. Kishen Sunder Sarma* (Such a suit is not barred by Section 9, Specific Relief Act)

(1902) 1902 Pun Re No 78 1902 Pun L R No 137, *Abdul Hamid v. Sarbuland Khan*

(1927) A I R 1927 Lah 11 (14) 97 Ind Cas 367, *Labh Singh v. Ahmad Shah*.

(1862) 1 Mad H C R 85 (89), *Doe. d Kullammal v. Kuppu Pillai*

(1915) A I R 1915 Mad 345 (348) 25 Ind Cas 109, *Ganapathy Mudali v. Venkatalakshmi Narasayya*.

(1921) A I R 1921 Mad 642 (643) 62 Ind Cas 396, *Puthulunga Padayachi v. Ponnusami Padayachi*.

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Note 4**

presumption of ownership arising in favour of the plaintiff from prior possession.⁸ In *Doe D. Harding v. Cooke*,⁹ Park, J., observed as follows :

"We alter no rule of law by deciding in favour of the lessor of the plaintiff. He has shown a presumptive title, arising out of twenty-three years' possession. The defendant sets up a later possession of ten years. There is presumption against presumption, which throws the defendant upon establishing, if he can, a title of a higher description."

(1932) A I R 1932 Mad 92 (83) : 135 Ind Cas 910, *Narayanappa v. Hanumanthappa*.

(1914) A I R 1914 Nag 55 (56, 57) : 10 Nag L R 188 : 27 Ind Cas 506, *Sambhasdeo v. Mahadeo*.

(1925) A I R 1925 Nag 82 (82) : 78 Ind Cas 722, *Maroti v. Sitaram*.

: Ali Khan.
v. Pragi.

(1917) A I R 1917 Pat 546 (547) : 39 Ind Cas 458 : 2 Pat L Jour 280, *Sahodra Kuer v. Gobardhan Tiwari*, (Section 9, Specific Relief Act, is no bar.)

(1920) A I R 1920 Pat 814 (815) : 57 Ind Cas 320, *Ajodhya Singh v. Awadh Bihari Das*.

(1923) A I R 1923 Pat 601 (602) : 119 Ind Cas 906 : 8 Pat 351, *Ranjit Singh v. Jhori Singh*.

(1937) A I R 1937 Pat 418 (422) : 171 Ind Cas 317, *Shiv Saran Ras v. Sukhdeo Ras*.

(1905) 3 Low Bur Rul 27 (28), *Watha v. Pe Hlaw*.

(1927) A I R 1927 Rang 203 (204) : 5 Rang 154 : 102 Ind Cas 696, *Ma Pwa Zon v. Ma Pan I*.

(1909) 2 Ind Cas 202 (203) (Cal), *Beni Madhab Christian v. Raj Chandra Pal*, (Tenant dispossessed by trespasser — Suit by tenant for possession.)

(1909) 3 Ind Cas 770 (771) : 33 Bom 499, *Jivanji Jamshetji v. Burjorji Naserwanji*.

(1909) 4 Ind Cas 216 (247) (Bom), *Bala Kushaba v. Abai Amrita Vaghmode*.

(1911) 9 Ind Cas 595 (595) (Mad), *Gowinda Padayachi v. Doraisami Padayachi*.

(1911) 11 Ind Cas 91 (95) (Oudh), *Hub Lal v. Jageshwar*.

(1911) 11 Ind Cas 537 (539) (Oudh), *Ramsan Khan v. Muhammad Yakub Khan*.

(1912) 15 Ind Cas 613 (614) (Mad), *Kalyanam Dasarayya v. Alalam Malappa*.

(1926) 97 Ind Cas 369 (372) (Lah), *Labh Singh v. Ahmad Shah*.

[See also (1917) A I R 1917 Pat 507 (508) : 39 Ind Cas 26, *Chandi Misser v. Narasingroy*.

(1924) A I R 1924 Pat 709 (710) : 78 Ind Cas 228, *Ahal Akir v. Baijnath Das*.

(1911) 12 Ind Cas 533 (593) (Mad), *Venkatachala Aiyangar v. Chinna Goundan* (No title in plaintiff or defendant — Plaintiff had ceased to be in possession before defendant occupied — Plaintiff cannot claim benefit of possessory title)

(1920) 67 Ind Cas 919 (919) (Lah), *Sidhu v. Dhanna*, (Suit for damages for cutting of trees claimed by plaintiff as in his possession)

(1907) 1907 App Cas 73 (79) : 76 L J P C 19 : 95 L T 800 : 23 T L R 272, *Ferry v. Charles*.

8. (1922) 15 Mad 315 (321) : 2 Mad L Jour 159, *Secretary of State v. Davolli Hazi*, (Following (1831) 7 Bing 316, *Doe d. Harding v. Cooke*.)

9. (1831) 33 R R 503 (501, 505) : 7 Bing 316 : 5 Moore & Payne 181 : 9 L J Q P 118.

The Legislature has, under Section 9 of the Specific Relief Act, 1877, provided that even as against the *true owner* the person dispossessed otherwise than in due course of law can recover possession in a suit brought for the purpose. Such a suit is, however, to be brought within six months of the date of dispossession under Art. 3 of this Act.¹⁰

Arts. 142 & 144
Note 4

Suits for possession based on prior possession and dispossession are generally referred to as suits based on *possessory title*, as distinguished from suits based on *proprietary title*.¹¹ If the plaintiff proves prior possession and dispossession within six months of the suit, and such dispossession is otherwise than in due course of law, he will be entitled to recover possession *notwithstanding* the defendant may be the true owner. In other words, the plaintiff will succeed irrespective of the question of proprietary title.¹² In other cases the suit would be governed by Article 142 and the plaintiff will be entitled to succeed as against all persons *except the true owner*. It would be therefore for the defendant in such cases to show that he has got a better title to the property than the plaintiff.¹³

10 See Notes to Article 3 *ante*.

11 Salmond on Jurisprudence, 8th Edition, page 325

(1914) A I R 1914 All 51 (55). 36 All 51 : 22 Ind Cas 622, *Umrao Singh v. Ramji Das*.

12. (1903) 5 Bom L R 264 (266, 267), *Ali v. Pachubibi*.

(1902) 1902 Pun Re No. 78 : 1902 Pun L R No. 187, *Abdul Hamid v. Sarbuland Khan*

(1903) 26 Mad 514 (516, 517) 13 Mad L Jour 146, *Narayana Rao v. Dharmachar* (But a decree in such a suit will not be *res judicata* on the question of title)

(1894) 4 Mad L Jour 25 (Jour) critical note on (1893) 20 Cal 834 (P C), *Ismail Ariff v. Mahomed Ghouse*.

13. (1890) 12 All 46 (50) 1888 All W N 33, *Lachho v. Har Sahai*.

(1900) 25 Bom 287 (291) 2 Bom L R 1111, *Hanmantrav v. Secretary of State*. (Per Jenkins C. J., Ranade J. dissenting)

(1903) 5 Bom L R 264 (266), *Ali v. Pachubibi*. (Defendant cannot succeed if he merely sets up title in a third person from whom he does not derive his right.)

(1936) A I R 1936 Bom 201 (209) 163 Ind Cas 632, *Gorindbhai Lallubhai v. Dahyabhai Nathabhai* (Do)

(1933) A I R 1933 Pat 6 (17) 11 Pat 701 141 Ind Cas 157, *Chaturbhuj Singh v. Saradacharan Guha*. (Do)

(1882) 11 Cal L R 183 (184), *Brojo Sunder Gossami v. Kosiash Chunder Kur* (In a suit for possession, it was found that the plaintiff had been some eleven years in possession until he was wrongfully ousted by the defendant. Held, that the defendant was bound to prove his title and that he could not be allowed to take advantage of his own wrongful act in order to shift the burden of proof upon his opponent)

(1927) A I R 1927 Mad 1185 (1186) 108 Ind Cas 194, *Maruthappan Asari v. Marimuthu Asari*

(1930) A I R 1930 Oudh 374 (376) 126 Ind Cas 675, *Sohan Lal v. Mahomed Hussain* (It is no doubt true that a plaintiff can be given a decree for possession on the basis of his possessory title even in cases other than

Arts. 142 & 144
Note 4

There have been, however, a number of cases in which it has been held that, apart from Section 9 of the Specific Relief Act, 1877, a suit will not lie at all on a possessory title.¹⁴ It is submitted that the latter view is opposed to the general trend of opinion and cannot be accepted as correct on principle. In *Ismail Ariff v. Mahomed Ghouse*,¹⁵ where the plaintiff sued for a declaration of title on the ground of his prior possession, their Lordships of the Privy Council observed as follows:

"The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By Section 9 of the Specific Relief Act (Act I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could by a suit instituted within six months from the date of the dispossession, have recovered possession notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrongdoer, to obtain a declaration of title as owner, and an injunction to restrain the wrongdoer from interfering with his possession."

- (1906) 1906 App Cas 569 (575) : 75 L J P C 109 : 95 L T 568, *Emmerson v. Maadison*. (Defendant who takes possession against plaintiff proves title—Plaintiff cannot succeed on the ground of prior possession.)
14. (1918) A I R 1918 Bom 153 (153) : 42 Bom 357 : 45 Ind Cas 550, *Bapuji Narayan v. Bhagwant Balwant*.
- (1932) A I R 1932 Oudh 122 (122) : 136 Ind Cas 256, *Zahida Degam v. Mumtaz Ali Khan*.
- (1893) 9 Cal 89 (41) : 11 Cal L R 342, *Debuchurn Baido v. Issur Chunder Manjee*.
- (1899) 17 Cal 256 (260), *Purmeshur Chowdhry v. Brij Lal Chowdhry*.
- (1906) 3 Cal L Jour 26 (S. N.).
- (1899) 3 Cal W N 158 (160), *Shama Churn Roy v. Abdul Kabeer*.
- (1868) 9 Sath W R 602 (605), *Kalee Chunder Sein v. Addoo Sheikh*. (The rule that "simple possession is conclusive evidence as against a wrongdoer" is not applicable when title is necessary to complete the plaintiff's title to sue.)
- (1869) 11 Sath W R 447 (447) : 3 Beng L R App 44, *Lakhi Kamar v. Ram Dutt Chowdhry*.
- (1917) A I R 1917 Cal 469 (478) : 36 Ind Cas 690, *Ramchandra Sil v. Ramanmani Dasi*.
- (1918) A I R 1918 Cal 532 (533) : 42 Ind Cas 881, *Gnanendra Nath v. Mohendra Mohini Debya*.
- (1921) A I R 1921 Cal 850 (853) : 82 Ind Cas 386, *Jnanendranath Mustaphi v. Dukhiram Santra*. (Obiter.)
- (1925) A I R 1925 Cal 1225 (1226) : 89 Ind Cas 180, *Year Mamud Mondal v. Paomocha Sarkar*.
- (1934) A I R 1934 Cal 561 (562) : 61 Cal 419 : 150 Ind Cas 723, *Kiran Chandra v. Prasunno Kumar*.
- (1925) A I R 1925 Pat 625 (666) : 4 Pat 510 : 87 Ind Cas 519, *Hitendra Singh v. Bameshwar Singh*. (Toaster, J., contra.)
- (1910) 17 Cal 256 (260), *Purmeshur Chowdhry v. Brij Lal Chowdhry*. 575, the 15

5. Suit on proprietary title. — It would follow from what has been stated in Note 2 *ante*, that a suit for immovable property would not be governed by Article 144 unless either the plaintiff's title came into existence while the defendant was in lawful possession, or the defendant's entry on the land was, at the date of the entry, consistent with the title of the plaintiff. It is clear, therefore, that the suit for possession of immovable property contemplated by Article 144 is one by a person *entitled to possession as owner* against a person in possession *without title*.¹ In *Chhatra Kumari Devi v. Mohan Bikram Shah*,² their Lordships of the Privy Council observed that Article 144 "is applicable only to a possessory suit by the *owner* of the property claimed against a person holding adversely to him without title". It was consequently held that a suit by a person who is not the owner, as for example, a person entitled to sue for the breach of a contract to convey properties or a beneficiary under a trust, is not governed by Article 144.

**Arts. 142 & 144
Note 5**

There is a difference of opinion as to whether Article 142 is confined to suits for possession on the ground of possessory title, or whether it is applicable to all cases of dispossession, whether the plaintiff is suing merely on his possessory title or on his proprietary title also. The general trend of opinion is that the Article will apply to all cases of alleged dispossession, whether the plaintiff sues on his proprietary or on his possessory title.³ The contrary view that the

Note 5

1. (1931) A I R 1931 P C 196 (199) : 58 Ind App 279 : 10 Pat 851 : 133 Ind Cas 705 (P C), *Chhatra Kumari Devi v. Mohan Bikram Shah*.
- (1938) A I R 1938 Nag 335 (347) : 177 Ind Cas 6 (F B), *Asaram v. Ludheshwar*.
- (1936) A I R 1936 Pat 147 (147) : 161 Ind Cas 585, *Mahomed Yusuf v. Mohamad Waheed*.
- (1914) A I R 1914 Low Bur 241 (243) : 8 Low Bur Rul 64 : 24 Ind Cas 911, *Secretary of State v. Ma Due*.
[See also (1912) 15 Ind Cas 285 (286) : 1912 Pun Re No. 124, *Achar Singh v. Badhau Singh*.]
2. (1931) A I R 1931 P C 196 (199) : 58 Ind App 279 : 10 Pat 851 : 133 Ind Cas 705 (P C).
3. (1888) 16 Ind App 23 (24, 25, 26) : 16 Cal 473 : 5 Sar 321 (P C), *Mohima Chunder Mozoomdar v. Mohesh Chunder Neogi*. (Suit was based on title and dispossession—Art. 142 was applied)
- (1934) A I R 1934 All 362 (365, 367) : 56 All 755 : 152 Ind Cas 12, *Kunja v. Niyaz Husain*.
- (1934) A I R 1934 All 993 (995) : 57 All 278 : 152 Ind Cas 1 (F B), *Bindhya-chal Chand v. Ram Gharib Chand*.
- (1936) A I R 1936 Pat 147 (147) : 161 Ind Cas 585, *Mahomed Yusuf v. Mohamad Waheed*. (Facts show that Art 142 was applied to the case)
- (1926) A I R 1926 Mad 181 (181, 182) : 91 Ind Cas 454, *Kuppuswami Mudaliar v. Chokalinga Mudaliar*.
- (1935) A I R 1935 Lah 507 (509) : 157 Ind Cas 399, *Kaur Sain v. Gulab*.
- (1926) A I R 1926 Cal 1166 (1167) : 97 Ind Cas 1003, *Birendra Nath Roy v. Satis Chandra Jourdar*.
- (1925) A I R 1925 Nag 370 (371) : 87 Ind Cas 1023, *Singuri v. Gambhirji*.
- (1915) A I R 1915 Bom 92 (93) : 39 Bom 335 : 28 Ind Cas 24, *Subbappa Shanikareppa v. Venkappa Golappa*.

Arts. 142 & 144
Notes 5-6

Article is confined to suits on possessory title and cannot apply to suits based on proprietary title, even though it is a case of dispossession,⁴ is, it is submitted, not correct. There does not seem to be anything in the Article itself limiting its applicability to suits on possessory title only. In *Nawab Muhammad Amanullah Khan v. Badan Singh*,⁵ the plaintiffs were proprietors of certain lands and had been dispossessed by the defendants. They thereupon sued the defendants for possession. It was held by their Lordships of the Privy Council that Art. 142 applied to the case. Their Lordships observed:

"Whether any proprietary right may have existed is not the question. It is whether there has been a dispossession or a discontinuance, which there clearly was. No doubt the proprietary right would continue to exist until by the operation of the law of limitation it had been extinguished; but upon the question whether the law of limitation applies, it appears to be clear that it comes within the terms of Article 142, and if there has been any doubt in the mind of the Courts in the Punjab as to what was the effect of the law of limitation in cases of this description, it seems to have arisen from the introduction of some opinion that there must be what is called adverse possession. It is unnecessary to enter upon that inquiry. Article 144 as to adverse possession only applies when there is no other Article which specially provides for the case.

"In this case their Lordships think that Article 142 does provide for the case, and that the suit is barred by the law of limitation."

6. "Immoveable property." — The expression "immoveable property" has not been defined in this Act and consequently is to be interpreted in the light of the definition thereof given in the General Clauses Act, 1897. Under that Act "immoveable property" has been defined as including land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. Where the question concerns the rights of Hindus, it has been held by their Lordships of the Privy Council, that the expression "immoveable property" should be taken to include whatever the Hindu Law classes as immovable, although not such in the

4. (1933) A I R 1933 Nag 274 (276) : 30 Nag L R 18 : 150 Ind Cas 679, *Mt. Jyoti v. Zabu*.

(1937) A I R 1937 Sind 226 (227, 228) : 170 Ind Cas 621 : 30 Sind L R 472, *Wadero Warisano v. Bhai Pursomal*.

(1929) A I R 1929 All 753 (753, 754) : 119 Ind Cas 6 : 51 All 1042, *Kanhaya Lal v. Girwar*. (Overruled by A I R 1934 All 993.)

(1929) A I R 1929 Lah 596 (597) : 127 Ind Cas 8, *Mohammad Far v. Mohammad Far*.

(1934) A I R 1934 Lah 245 (247) : 144 Ind Cas 72, *Ali Akbar v. Rakha*.

[See (1933) A I R 1933 All 775 (777) : 55 All 209 : 143 Ind Cas 497, *Kallan v. Mohammad Nabi Khan*. (Must be taken to be overruled by A I R 1934 All 993)]

5. (1889) 16 Ind App 148 (150, 151) : 17 Cal 137 : 1890 Pun Re No 23 : 13 Ind Jur 330 : 5 Sar 412 (P C).

ordinary acceptation of the word.¹ "The question must," observed their Lordships, "in every case be whether the subject of the suit is in the nature of immovable property, or of an interest in immovable property; and if its nature and quality can only be determined by Hindu Law and usage, the Hindu Law may be properly invoked for that purpose."

Arts. 142 & 144
Note 6

Applying this principle it was held in the undermentioned cases² that a right to a cash allowance granted for the support of a Hindu temple out of *Antastha Sadilvar* (i. e., extra assessment levied to meet local charges) and to three *khundis* of rice to be levied from certain *mahals*, under a *sanad* granted by the Peshwa, was immovable property or an interest in immovable property within the meaning of clause 12 of Section 1 of the Act of 1859.

The following have all been held to be immovable property:—

1. Right to a hereditary office with emoluments attached thereto³
2. Right to levy certain tolls on paddy exports granted by the Peshwas, called *Tipnis Pansare*⁴
3. Right to *brit* offerings⁵
4. Right to officiate at funeral ceremonies of Hindus called *Brit Jajmanka*⁶
5. Right to *Naukar* allowance out of a particular village.⁷
6. Standing trees⁸

Note 6

1. (1873) 1 Ind App 34 (50, 51) 18 Beng L R 254 21 Suth W R 178 · 10 Bom H C R 281 8 Sar 306 (P C), *Maharana Fettehsangji v. Dessai Kallianraji* (6 Bom H C R A C J 137, Approved)
[See also (1872) 9 Bom H C R 99 (112), *Balwantrao v. Pursholam*. (Term "immovable property" is not a *locabulum artis* of the English law)
(1884) 10 Cal 697 (708), *Gopinath Chobey v. Bhugwat Pershad.*]
2. (1892) 6 Bom 546 (559) : 6 Ind Jur 648 (F B), *Collector of Thana v. Hars Sitaram*.
(1880) 5 Bom 322 (332), *Collector of Thana v. Krishnanath Govind*
3. (1872) 9 Bom H C R 99 (113), *Balwantrao v. Pursholam*.
(1874) 1874 Bom P J 295 (296), *Shidramshet v. Huchaya*.
(1886) 10 Bom 149 (151), *Lakshman Das v. Manohar Genesh*.
[See also (1869) 6 Bom H C R 137 (139), *Krishnabhat v. Kapabhat.*]
4. (1909) 2 Ind Cas 489 (489) 33 Bom 373, *Krishnaji Pandurang v. Gajanan Balwant*
5. (1908) 1908 Pun Re No 34 · 1908 Pun L R No 163 · 1908 Pun W R No. 96, *Mohan Lal v. Janki*
6. (1883) 10 Cal 73 (74) 13 Cal L R 263 : 8 Ind Jur 197, *Raghoo Pandey v. Kassey Parey*.
7. (1916) A I R 1916 Oudh 129 (132) · 19 Oudh Cas 49 33 Ind Cas 461, *Deputy Commissioner, Fyzabad v. Jagjwan Balsh Singh*.
8. (1895) 19 Bom 207 (209), *Sakharam Mulshet v. Vishram*.
(1831) 16 Bom 353 (356), *Dapu v. Dhondi*. (Possession of mango trees.)
(1881) 3 All 435 (437) · 1881 All W N 9 · 5 Ind Jur 652, *Jagram Bibi v. Ganeshi*.
(1867) 2 Agra 300 (301), *Mt. Ghufoorun Bebec v. Khicajeh Mustufedeh*.
(1884) 1884 Pun Re No 112, *Jamal Singh v. Ladha*

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Note 6

7. Materials of a standing house.⁹
8. Jagir income arising out of land.¹⁰
9. The rights reserved to patnidaris and comprehensively included in the word "contract" in Section 51 of the Bengal Chaukidari Act (6 of 1870).¹¹

The following are not immovable property:—

1. The proceeds of the sale of immovable property.¹²
2. A *pala* or turn of worship.¹³
3. An agreement to grant a lease.¹⁴
4. Arrears of land revenue or cess.¹⁵
5. Money payable as marriage dues to the holder of a hereditary office in a temple.¹⁶
6. Right to have one's name entered in the Revenue Registers.¹⁷
7. Right of exclusive worship of idol.¹⁸

There is a difference of opinion as to whether the space above a land belonging to the owner of the land is immovable property which can be acquired by adverse encroachment thereon for a period of twelve years. According to the High Courts of Allahabad and Madras, an encroachment on such space is an adverse possession of immovable property.¹⁹ The Bombay High Court has expressed

[See also (1872) 4 N W P H C R 167 (169), *Hanooman Pershad v. Surubjeet Singh*. (Right to recover value of trees cut down by defendant is not an interest in immovable property.)]

(1909) 1 Ind Cas 903 (904) : 5 Nag L R 21, *Parmanand v. Birlhu*. (A right to collect lac from trees)

(1936) A I R 1936 Pat 66 (67) : 160 Ind Cas 1054, *Moti Singh v. Deoki Singh*.

(1921) A I R 1921 Pat 482 (482) 63 Ind Cas 264, *Beni Prasad v. Suraj Singh*.

(1914) A I R 1914 Low Bur 241 (243) : 8 Low Bur Rul 64 : 24 Ind Cas 911, *Secretary of State v. Ma Dwe*.]

9. (1923) A I R 1923 Lah 150 (151) : 73 Ind Cas 705, *Shanchi Khan v. Karam Chand*.

(1875) 8 Mad H C R 100 (102), *Narayana Pillai v. Ramasawmy Thavutharan*.

10. (1894) 1894 Pua Re No 4, *Ram Pershad v. Kishen Singh*

11. (1918) A I R 1918 P C 85 (86, 87) : 46 Cal 173 : 45 Ind App 162 : 48 Ind Cas 262 (P C), *Maharaja Ranjit Singh v. Maharaj Bahadur Singh*.

12. (1918) A I R 1918 Pat 548 (551) : 46 Ind Cas 627, *Radha Kishan v. Nauratan Lal*

13. (1919) A I R 1919 Cal 671 (672) : 46 Cal 455 : 47 Ind Cas 25, *Narasingha Bana Goswami v. Prolhodman Tevari*

14. (1874) 22 Suth W R 287 (287), *Ram Sahoy Lall v. Bibee Chouban*. (Nor

15.

16

17.

erest

Roy v. Monmohuni Dassi.

1 Ind Cas 1094, *State of Indore v.*

Jour 281, *Ratnaichu Mudaliar v.*

conflicting opinions.²⁰

Arts. 142 & 144.
Notes 6-7

7. Interest in immovable property. — The scope of Article 144 seems to be wider than that of Article 142. The latter is limited to suits for possession of *immovable property*; the former includes, in addition, suits for possession of *interests* in immovable property.¹ A suit for the possession of an interest in immovable property would be governed, not by Article 142 but by Article 144.² This, it is conceived, would be so even if the case is one of dispossession of the plaintiff.³ It is also conceived that the interest must, for the purpose of this Article, be such as is capable of being enjoyed by acts of ownership, for unless this is so, there cannot be any adverse possession of such interest.

In *Maharana Fatehsanghi v. Desai Kallanraji*,⁴ it was held by the Privy Council that a *toda giras haq*, i. e., a right to receive an annual payment, the liability for which is not a mere personal liability, but one which attaches to the inamdar in whosoever hands the village may pass, was 'an interest in immovable property' within the meaning of clause 12 of Section 1 of the Act of 1859. The following have also been held to be interests in immovable property:

- 1 An *exclusive* right of fishery.⁵ It must be noted that a right of fishery which does not exclude the owner or

(1916) A I R 1916 Mad 613 (615) 38 Mad G 17 Ind Cas 158, *Basaveswaraswami v. Bellari Municipal Council*.

(See also (1910) 7 Ind Cas 571 (572) (Mad), *Admarayanamma v. Syed Murtaza Sahib* (Plaintiff putting up a buttress and in possession thereof for over twelve years must be deemed to have acquired a title to the site covered by the buttress))

20 (1925) A I R 1925 Bom 335 (337) 87 Ind Cas 1003, *Bahadurmal v. Mohanlal* (Right to open shutters and maintain weather frames is acquired by adverse possession—It is not an easement)

(1932) A I R 1932 Bom 221 (224) 133 Ind Cas 459, *Chhaganlal v. Hemchand* (The column of air occupied by a projection over the land of a neighbour is not immovable property or any interest therein within the meaning of Article 144, capable of being acquired by adverse possession)

(1913) 20 Ind Cas 216 (246) 37 Bom 491, *Chhotalal v. Mansilal* (Do)

(1922) A I R 1922 Bom 83 (84) 67 Ind Cas 856 46 Bom 827, *Kashibhai Kaludas v. Vallabhai Wagibhai*.

Note 7

1. (1911) 12 Ind Cas 305 (307) (Cal), *Lokenath Bidyadhar v. Jahania Bibi*
[See also (1914) A I R 1914 Cal 762 (763) 23 Ind Cas 136 (138), *Hem Chandra v. Secretary of State*]

2. (1911) 12 Ind Cas 305 (307) (Cal), *Lokenath Bidyadhar v. Jahania Bibi*.
(1932) A I R 1932 Cal 300 (302) 59 Cal 344 137 Ind Cas 279, *Krishna Nandi v. Lokenath Mookerjee*.
[See also (1923) A I R 1923 Pat 58 (62) 1 Pat 674 67 Ind Cas 954, *Henry Hill & Co v. Sheoraj Rai*]

3 See the cases cited in Foot-Note (2)

4. (1874) 21 South W R 178 (182) 1 Ind App 34 13 Beng L R 254 10 Bom H C R 291 3 Sar 306 (P C)

5. (1932) A I R 1932 Cal 300 (302) 59 Cal 344 137 Ind Cas 279, *Krishna Nandi v. Lokenath Mookerjee*.

(1911) 12 Ind Cas 305 (307) (Cal), *Lokenath v. Jahania Bibi*

**Arts. 142 & 144
Note 7**

other persons from fishing, is only an *easement*.⁶ (See also Notes to the definition of 'easement' under Section 2 *ante*.)

2. Right to possession and management of *saranjam* property.⁷
3. Right to collect assessment of lands endowed in favour of a shrine.⁸
4. Right of occupancy tenant in the land.⁹
5. Right to *parjat*, *charai* and *charsai* dues.¹⁰
6. Right to *Mukurrari* rent.¹¹
7. Right to levy summary cess over land.¹²
8. Right to a watercourse.¹³
9. Right of a zamindar or landlord to recover *melwaram* from land.¹⁴

(1930) A I R 1930 Mad 679 (680) : 125 Ind Cas 545, *Secretary of State v. District Board of Tanjore*.

(1923) A I R 1923 Pat 58 (62) : 1 Pat 674 : 67 Ind Cas 954, *Henry Hill & Co. v. Sheoraj Rai*.

(1917) A I R 1917 Cal 656 (657) : 34 Ind Cas 841, *Madhabchandra Mandal v. Nagendra Nath Sen*.

(1922) A I R 1922 Pat 9 (11) : 64 Ind Cas 346, *Henry Hill & Co. v. Sheoraj Rai*.

(1927) A I R 1927 Cal 403 (405) : 103 Ind Cas 13, *Debendra Lal v. Secretary of State*.

(1878) 3 Cal 276 (279) : 1 Cal L R 592, *Parbutty Nath Roy v. Mudho Parol*.
[See also (1927) A I R 1927 Nag 147 (149) : 23 Nag L R 16 : 100 Ind Cas 438, *Manya v. Sitaram*. (Grant of a lease for fishing creates an interest in immovable property)]

(1880) 5 Cal 945 (948) : 6 Cal L R 269 : 3 Shome L R 123, *Chundee Churn Roy v. Shub Chunder Mundul*.]

6. (1937) A I R 1937 Nag 38 (39) : 168 Ind Cas 921, *Nago v. Mt. Lahani*.

(1885) 9 Mad 285 (303), *Sivasubramanya v. Secretary of State*.

(1921) A I R 1921 Bom 417 (418) : 45 Bom 50 : 57 Ind Cas 143, *Ananta v. Ganu* (Right to take water from another's well is an easement and not an interest in immovable property)

The following cases which held that easement is an interest in immovable property cannot be regarded as good law —

(1882) 5 Mad 253 (255) : 6 Ind Jur 465, *Karupam Zamindar v. Merangi Zamindar*.

(1875) 24 Buth W R 300 (300), *Mohunt Deo Surun Poory v. Moonshee Mahomed Ismail*.

7. (1891) 15 Bom 247 (255), *Narayan Jaganath v. Vasudeo Vishnu*.

8. (1933) A I R 1933 Bom 26 (32) : 141 Ind Cas 103, *Narayan Balwant v. Dattatraya Ramchandra*.

9. (1876) 1876 Pun Re No 19, *Sahib Rai v. Khair Shah*.

10. (1918) A I R 1918 Oudh 181 (183) : 21 Oudh Cas 119 : 46 Ind Cas 439, *Sheoraj Singh v. Debi Dakhsh Singh*.

11. (1927) A I R 1927 Pat 49 (50) : 97 Ind Cas 637, *Gopalcharjya v. Bhum Kali*. (Gift of mukarrari rent—Suit to set aside, is governed by Article 144.)

12. (1911) 12 Ind Cas 716 (718) : 36 Bom 174, *Ranmal Singji v. Mahashankar*.

13. (1889) 4 O P L R 16 (17), *Amritnath v. Moti Lal*.

14. (1937) A I R 1937 Mad 303 (306, 307) : 173 Ind Cas 307, *Chakrapani Rao v. Venkataadri Appa Rao*. (Melwaram right when consisting of imposition of full assessment is interest in immovable property.)

[See also (1898) 12 Bom 80 (84), *Krishnaji v. Vithalrao*. (Right to receive share of the income and profits from the land of another.)]

As to whether a right to *malikana* allowance is an interest in immovable property, see Note 20 to Article 132, *ante*. Arts. 142 & 144
Notes 7-8

Where immovable property is mortgaged under a simple mortgage, or under some other form of mortgage under which the mortgagor is entitled to periodical accounts or payments from the mortgagees, the mortgagor's interest is capable of being adversely possessed. In this sense an equity of redemption may be said to be an interest in immovable property which can be acquired by adverse possession.¹⁵ Where, however, A usufructually mortgages his property to B and A has nothing more than a bare right to redeem vested in him, can such right be adversely possessed, and would a suit for a declaration of such right be a suit for possession of an interest in immovable property within the meaning of Article 144? It has been held in the undermentioned cases¹⁶ that it would be so. It is submitted that this view does not seem to be correct on principle. The right is one that cannot be enjoyed in the sense in which an enjoyment is necessary in order to constitute adverse possession. See the undermentioned cases.¹⁷

8. "Plaintiff" in Article 142, meaning of. — Section 2, subsection 8 defines the word "plaintiff" as including any person from or through whom a plaintiff derives his right to sue.¹⁸ Where therefore the plaintiff claims a right to property through another and the

15 See (1904) 32 Ind App 23 (32) 32 Cal 296 · 9 Cal W N 201 2 All L Jour 71 7 Bom L R 1 1 Cal L Jour 594 8 Sar 734 (P C), *Khiarajmal v. Daim*.

[See also (1900) 14 Bom 176 (160), *Puttappa v. Timmaji*]

16. (1936) A I R 1936 Oudh 163 (169) 160 Ind Cas 920, *Udharbhan Singh v. Sheoambar Sahai*.

(1925) A I R 1925 Oudh 659 (660) 87 Ind Cas 208, *Annapoorna Koer v. Jageshar Misra*.

(1914) A I R 1914 Oudh 283 (264) 17 Oudh Cas 294 25 Ind Cas 600, *Hubdar Khan v. Gajadhar Chaube*

(1902) 6 Cal W N 601 (611), *Lalla Kanho Lal v. Mt Manakshi Bibi*

(1925) A I R 1925 Bom 9 (12) 48 Bom 654 84 Ind Cas 374, *Hanamgouda Shid Gouda v. Irgouda Shingouda*.

17 (1916) A I R 1916 All 79 (80) 38 All 411 34 Ind Cas 171, *Kunwar Sen v. Darbars Lal* (A right to redeem immovable property cannot be adversely possessed when the right to possession and actual possession is in the hands of the mortgagee)

(1935) A I R 1935 All 174 (178) 153 Ind Cas 73, *Shyam Lal v. Mohamad Ali* (Property in possession of usufructuary mortgagee—Person merely by getting his name recorded in village papers for several years cannot acquire title by adverse possession)

(1920) A I R 1920 Lah 800 (801) 1 Lah 549 59 Ind Cas 478, *Shah Nawaz v. Sheikh Ahmad* (Right to possession and actual possession in mortgagee's hands—Person getting his name recorded in revenue papers cannot be in adverse possession of right to redeem)

(1915) A I R 1915 Mad 1150 (1151) 26 Ind Cas 529, *Lakshminarayana Iyer v. Ulagammal* (There can be no adverse possession of any interest in land by a person who does not derive any benefit whatever during the period of the alleged possession)

Note 8

1a. (1937) A I R 1937 Cal 343 (346) 173 Ind Cas 439, *Narattam Dey v. Deben-dra Lal Khan*.

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Notes 8-9

latter was dispossessed or the possession of the defendant became adverse to the latter, the date of dispossession of the plaintiff or the date when the possession became adverse to the plaintiff, would, for the purpose of these Articles, be the date on which his predecessor-in-title was dispossessed or on which the defendant's possession became adverse to the predecessor-in-title.^{1b}

An adopted son does not claim through his adoptive mother, and her dispossession or a discontinuance of possession by her is not one by the adopted son.¹ So also, a reversioner succeeding to an estate held by a limited owner, or a person succeeding to another in the event of a contingency, does not claim through the other. A dispossession of the latter is not a dispossession of the former.²

9. "Has been dispossessed or has discontinued the possession."—A dispossession must be distinguished from a discontinuance of possession. In *Rains v. Buxton*,¹ which was a case arising under Section 3, Chapter 27, 3 & 4, Will. IV, which used words similar to those used in Article 142 of this Act, Mr. Justice Fry observed :

"In my view the difference between dispossession and the discontinuance of possession might be expressed in this way—the one is where a person comes in and drives out the others from possession: the other case is where the person in possession goes out and is followed into possession by other persons."

This view has been adopted in numerous cases.² Thus, where *A* is in possession of land and *B* comes on the land and drives out *A* by

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- 1b. (1865) 2 Mad H C R 391 (392), *Chandra Chodanghi v. Timmaya*.
 (1874) 21 Suth W R 282 (282), *Ahmed Ali v. Haree Chand*.
 (1930) A I R 1930 Cal 474 (475, 476) : 128 Ind Cas 201, *Bhushan Mondal v. Sarbeshwar Mondal*.
 (1925) A I R 1925 Oudh 729 (730) : 87 Ind Cas 1021, *Bhagwan Din v. Ajudhia*.
 (1905) 13 B 1222 (1222) (1905) 5 B 141 : 89 Ind Cas 177, *Bhatia v. Bhatia*.

- (1869) 2 Beng L R A C 318 (315), *Gobind Chandra Sarma v. Anand Mohan Sarma*. (Once adverse possession has started against the predecessor in title of the plaintiff, then plaintiff does not get a fresh cause of action on his being entitled to the property.)
 (1919) A I R 1919 Mad 798 (808) : 41 Mad 749 : 47 Ind Cas 733, *The Midnapore Zamindari Co. v. Malayandi Appasami Naicher*.
 1. (1905) 2 Cal L Jour 87 (94) : 9 Cal W N 795, *Harek Chand Babu v. Bijoychand Mahatab*.
 2. (1912) 16 Ind Cas 365 (367) : 40 Cal 173, *Presonna Kumar v. Sri Kantha*. (A ghatwal does not claim through his father as his predecessor within the meaning of S. 2, Limitation Act.)

Note 9

1. (1880) 28 W R (Eng) 954 (956) : 49 L J Ch 478 : 14 Ch D 537 : 43 L T 88.
 2. (1930) A I R 1930 Cal 247 (248) : 125 Ind Cas 732, *Rakkhal Das v. Khirode Bandhu*.
 (1925) A I R 1925-Mad 834 (835) : 87 Ind Cas 386, *Govinda Ramanuja v. Mahomed Esoof*.
 (1919) A I R 1919 Mad 8 (10) : 49 Ind Cas 89, *Kuppusami Chetty v. Ramiah*.

a tortious act, the case is one of dispossession.^{2a} But where, for instance, *A* executes a transfer in favour of *B* and delivers to him the possession of the property transferred, the case is not one of dispossession but one of *discontinuance* of possession by *A* from the date of the delivery of possession under the transfer.³

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There are, however, some essential features common to both dispossession and discontinuance of possession.

1 In either case there must be a termination of possession on the part of the person who was in possession.⁴

2. It must be followed up by another person's actual possession.⁵

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- (1922) A I R 1922 Cal 224 (225) 67 Ind Cas 1005, *Behari Lal v. Nityananda*
 (1929) A I R 1928 Cal 104 (105, 106) . 107 Ind Cas 95, *Moresh Chandra v. Hemendranath*.
 (1929) A I R 1929 Cal 297 (297) 56 Cal 914 . 119 Ind Cas 289, *Gaya Prasad v. Bahyamani*
 (1939) A I R 1939 Nag 7 (9), *Meherban Lall v. Yusufkhan Kallu*
 (1938) A I R 1938 Sind 193 (201) 178 Ind Cas 600, *Jrab Jhanglu v. Panjalsah Yakubalsah*
 (1926) A I R 1926 Pat 130 (137) 5 Pat 80 91 Ind Cas 169, *Midnapur Zamindary Co., Ltd v. Ram Kana Singh* (Mere refusal by the landlord to recognise lease does not amount to dispossession of the tenant. Positive act of dispossession is necessary.)
 (1910) 8 Ind Cas 639 (642) : 35 Bom 79, *Vasudeo Atmaram v. Eknath Dal-Krishna*
 (1923) A I R 1923 Cal 1 (6) . 50 Cal 49 74 Ind 630, *Charu Chandra v. Nahush Chandra*.
 (1916) A I R 1916 Cal 751 (752) . 31 Ind Cas 242, *Brojendra Kishore v. Bharat Chandra*.
 (1921) A I R 1921 Pat 36 (36) 57 Ind Cas 717 5 Pat L Jour 592, *Madan Mohan Singh v. Drij Behari Lal*.
 (1921) A I R 1921 Pat 277 (277, 278) 61 Ind Cas 78, *Bahadur Ali Khan v. Secretary of State*.
 (1922) A I R 1922 Mad 59 (61) 45 Mad 370 . 67 Ind Cas 246, *Ramiah Ramayya v. Kottamma*.
 (1897) 7 Mad L Jour 186 (188), *Kishnammal v. Pichannarayyan*.
 2a (1880) 28 W R (Eng) 452 (454) 49 L J Ex.220 5 Ex D 264 42 L T 463 : 41 J P 488, *Leigh v. Jack*
 (1939) A I R 1939 Nag 7 (9) 1938 Nag L Jour 418 (420), *Meherban Lall v. Yusufkhan Kallu*.
 3. (1938) A I R 1938 Nag 335 (347) 177 Ind Cas 6 (F B), *Asaram v. Ludheswar*.
 (1918) A I R 1918 P C 180 (181) 46 Cal 694 46 Ind App 60 50 Ind Cas 203 (P C), *Rani Kuar Mani Singh v. Nawab of Murshidabad* (Court of Wards alienating ward's property and alienee obtaining possession—Ward afterwards suing to recover property on the ground of the alienation not binding on him—There is discontinuance of possession by the ward on alienee obtaining possession under the transfer and the ward must sue within 12 years of such discontinuance)
 (1932) A I R 1932 P C 55(55) 59 Ind App 180 11 Pat 272 136 Ind Cas 798 (P C), *Bageswari Charan Singh v. Jagannath Kuari*.
 (1906) 29 All 281 (283) 3 All L Jour 16 : 1905 All W N 282, *Madho Ram Singh v. Surjan Kunuar*.

4. See cases cited in Foot-Note (2).

5. See cases cited in Foot-Note (2) and Foot-Note (10a)

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3 The latter's possession must be *adverse* to the former.⁶

Termination of possession :

It is obvious that so long as a person continues to do acts of possession on a land he cannot be said to terminate it^{6a} Mere acts of trespass by the defendant are not enough to show that the plaintiff's possession has terminated if he has been enjoying the property in such manner as it is capable of being enjoyed.⁷ "In order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it, and therefore it is necessary to look at the position in which the former owner stands towards the land as well as to the acts done by the alleged disposessor."^{7a} What acts of the defendant are sufficient to establish a termination of the former owner's possession must be judged from the circumstances of the case and from the nature of the property in question.^{7b} In *Basant Kumar*

6. (1928) A I R 1928 Cal 118 (119) . 105 Ind Cas 369, *Gopal Chandra v. Monmohini Dasi*.
- (1933) A I R 1933 Pat 6 (16) 141 Ind Cas 157 : 11 Pat 701, *Chaturbhuj Singh v. Sarada Charan Guha*. (Dispossession merely means exclusion from possession without consent of the person concerned.)
- (1931) A I R 1931 Rang 40 (48) : 8 Rang 556 . 129 Ind Cas 511, *Maung Sin v. Maung So Min*. (Per Brown, J : Possession by leave and license of another person recognising his title is not dispossession or discontinuance of possession.)
- (1893) 1893 Pun Re No. 104, *Sundar v. Mt. Rohonsu*.
[See also (1935) A I R 1935 All 639 (640) . 157 Ind Cas 696, *Kallu v. Mt. Jayanti*.]
- Ga (1922) A I R 1922 Cal 224 (225) : 67 Ind Cas 1005, *Behari Lal Nandi v. Nrsityanand Ghose*.
7. (1880) 28 W R (Eng) 452 (454) . 49 L J Ex 220 : 5 Ex D 264 . 42 L T 463 : 44 J P 488, *Leigh v. Jack*.
- (1909) 1 I C. 514 (516, 517) : 36 Cal 28, *Ganoda Sundari v. Nalini Ranjan*.
- (1930) A I R 1930 Oudh 304 (305) : 127 Ind Cas 47, *Abdul Rahim v. Wazir Ali*. (Mere planting of trees on another's land does not amount to dispossession unless there is denial of right of owner.)
- (1913) 20 Ind Cas 79 (80) (Cal), *Purna Chandra v. Ananta Keot*.
- (1929) A I R 1929 Lah 71 (71) 109 Ind Cas 657, *Mohammad Amin Khan v. Balanda*. (Collecting cattle on the land or fixing pegs or erecting a platform on it by the defendant will not be sufficient to make the owner out of possession.)
- (1926) A I R 1926 Pat 130 (135) . 91 Ind Cas 169 : 5 Pat 80, *Midnapore Zamindars Co. Ltd. v. Ram Kanai Singh*.
- (1925) A I R 1925 Lah 53 (53) . 79 Ind Cas 89, *Munna Lal v. Hamid Ali*. (Mere paper dispossession by mutation of names does not amount to dispossession.)
- (1906) 11 Cal W N 186 (189) . 4 Cal L Jour 568, *Choudhry Shamanund v. ...*
- 7a (1917) A I R 1917 P C 18 (22) : 44 Cal 858 . 44 Ind App 104 : 40 Ind Cas 337 (P C), *Basant Kumar v. Secretary of State*.
[See also (1907) 35 Cal 961 (971, 972) : 6 Cal L Jour 735 : 12 Cal W N 127, *Jogendra Nath Rai v. Baldeo Das*
(1904) 31 Cal 397 (405), *Wali Ahmed Choudhry v. Tota Mea*.]
- 7b (1929) A I R 1929 Cal 297 (297) : 56 Cal 914 : 119 Ind Cas 289, *Gaya Prosad v. Bahyamani Dasi*. (Where a Hindu widow, who had been enjoying

v. *Secretary of State*,⁸ their Lordships of the Privy Council observed as follows :

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"'It is impossible', says Lord Halsbury in *Marshall v Taylor*,⁹ 'to speak with exact precision about the degree of possession or dispossession that will do, unless you have regard, as Lord Justice Cotton said in *Leigh v Jack*,¹⁰ to the nature of the property.' An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely acts, which *prima facie* are acts of dispossession, may, under particular circumstances, fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character or have some other object "

the property as tenant-in common along with her brothers-in-law, sued to establish her possession and it appeared that her title had not been denied and that she had been receiving rents and profits, held that there was no dispossession)

- (1929) A I R 1929 Cal 417 (417, 418) 120 Ind Cas 104, *Profulla Chandra v Kshetra Lal Sinha* (Mere bringing of suit for rent against a person in possession is not an attempt to disturb possession of a party.)
(1900) 1 Ch 19 (23) 69 L J Ch 87 81 L T 564 48 W R (Eng) 177 16 T L R 44, *Littledale v Liverpool College* (Erecting and locking gates is not an act of dispossession)
(1909) 3 Ind Cas 399 (399) (Cal), *Sonatan Sheikh v Chalu Sheikh* (Where the plaintiff allows defendant the user of his land on payment of rent and defendant afterwards denies the plaintiff's title and pays rent to the superior landlord, these facts do not amount to dispossession but adverse possession)
(1886) 1896 All W N 277 (277), *Abdulla v Hargu Lall* (B trying to build a wall on A's land and prevented by order of Magistrate from doing so—No dispossession of A from date of order)
(1870) 13 Buth W R 64 (65, 66), *Nund Kishore Singh v Huree Pershad*

tenure claimed—This view seems questionable as there is no physical dispossession in such a case)

- (1920) A I R 1920 Cal 757 (758) 60 Ind Cas 386, *Maharaj Bahadur Singh v. Pulin Mal*
(1901) 7 Oudh Cas 259 (263), *Basant Singh v Nawab Badshah Bahu Begam* (Decree of the Settlement Court giving the mortgagees proprietary possession of the property is a dispossession of the mortgagors)
(1906) 9 Oudh Cas 292 (295), *Raja Mumtaz Ali Khan v Sarju Singh* (Assertion of under-proprietary title by the tenant does not amount to dispossession)
(1915) A I R 1915 Cal 727 (728) 26 Ind Cas 366, *Anat Ullah v Sadat Ullah*. (Where the proprietor was prevented from collecting the rent from his tenants, it was held that the case was one of dispossession)
(1935) 163 Ind Cas 897 (903) 62 Cal L Jour 177 (188) 63 Cal 300, *Surendra Kumar Roy v. Ahmed Nawab*
(1917) A I R 1917 Pat 528 (529) 39 Ind Cas 777 2 Pat L Jour 259, *Baker Hussain v Ranjit Koer* (If a person is completely ousted from his right to catch fish in water on his own land by a definite act of aggression by another party, such act amounts to a dispossession)
8 (1917) A I R 1917 P C 18 (22) 44 Cal 858 44 Ind App 104 40 Ind Cas 337 (P C)
9 (1895) 64 L J Ch 416 (418) 1 Ch 641 12 R 310 72 L T 670
10 (1880) 28 W R (Eng) 452 (454) 49 L J Ex 220 5 F & D 246.

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Where there has been, in fact, a cessation of possession, the question of intention is immaterial, but in determining whether there has been discontinuance of possession, intention cannot altogether be left out of account.^{10a}

Another person must follow into possession :

Where *A* is said to dispossess *B*, it clearly involves the idea that *B*'s possession has terminated by the tortious act of *A* and that *A* has entered into possession by driving out *B*. It has been held that it is necessary even to constitute a discontinuance of possession that the termination of one man's possession must be followed by the actual possession of another.^{10b} A mere ceasing by the person in possession to occupy or enjoy the property is not a discontinuance within the meaning of the Article.¹¹ Nor would a resistance offered by one of several persons in possession to another of such persons in

10a (1925) A I R 1925 Cal 981 (934) : 85 Ind Cas 591, *Abhoyanhar v. Satyendra Prasanna Bose*.

10b (1910) 8 Ind Cas 639 (642) . 35 Bom 79, *Vasudeo v. Elnath*. (*B* obtaining decree for possession against *A* but failing to execute it within the period of limitation—This does not amount to discontinuance of possession by *B*.)

(1913) 19 Ind Cas 3 (3) (Mad), *Thangaswami Thetan v. Rajaram Naidu*. (Where the owner leaves the land in the possession of strangers for over 20 years and lives away cultivating other lands, it constitutes abandonment.)

(1881) 1881 Pun Re No. 41, *Lutf Ali v. Khushraht Bai*

(1897) 1 Cal W N 277 (278), *Sonnur Ali Hazarika v. J. Huttman*.

(1914) A I R 1914 Upp Bur 44 (45) . 27 Ind Cas 981, *Nga Po v. Nga So Pe*

(1923) A I R 1923 Cal 1 (6) . 50 Cal 49 . 74 Ind Cas 630, *Charu Chandra Pramanick v. Nakhsh Chandra Kundoo*.

(1925) A I R 1925 Mad 834 (835) : 87 Ind Cas 386, *Govinda Ramanuja v. Mohamed Esoof*

(1919) A I R 1919 Mad 8 (10) : 49 Ind Cas 89, *Kuppuswamy v. Kusala Ramiah*.

(1921) A I R 1921 Pat 36 (36) : 57 Ind Cas 717 : 5 Pat L Jour 592, *Madan Mohan Singh v. Braj Bihari Lal*.

(1929) A I R 1929 Pat 117 (120) : 8 Pat 549 . 115 Ind Cas 699, *Bageswari Charan Singh v. Jagannath Kuari*.

(1930) A I R 1930 Lah 303 (303) : 120 Ind Cas 792, *Mangal Singh v. Ali Sher*.

11. (1917) A I R 1917 P C 18 (21, 22) : 44 Cal 858 : 44 Ind App 104 . 40 Ind Cas 837 (P C), *Basant Kumar v. Secretary of State*.

(1934) A I R 1934 Bom 207 (209) : 58 Bom 397 & 406 : 149 Ind Cas 882 & 885 (F B), *Krishnaji v. Madhusa*. (A I R 1921 Pat 36, Followed)

(1919) A I R 1919 Mad 8 (10) : 49 Ind Cas 89, *Kuppuswamy v. Kusala Ramiah*.

(1878) 20 Euth W R 183 (184), *Pudar Bindoo Mahantee v. Mohesh Chunder Sen* (Receipt of rent is good evidence of possession but it does not necessarily follow that a party in possession has been disturbed because he cannot prove that he has collected rent of a particular portion of the property)

(1928) 107 Ind Cas 779 (780) (Lah), *Nur Khan v. Fakir Abdullah*. (Where a person is shown to have been in possession of land for a number of years, the mere fact that the land was not cultivated during certain harvests does not make him out of possession during that period)

(1919) A I R 1919 Cal 694 (695) . 44 Ind Cas 297, *Bengal Coal Co. Ltd. v.*

(1906)

(1884)

his attempt to get separate possession of his share amount to a dispossession of the latter.^{11a} In *McDonnell v. McKinty*,¹² which was also a case under Section 3, Chapter 27, 3 & 4 Will. IV, Blackburne, C. J., observed:

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"The word 'discontinuance', I understand to mean an abandonment of possession by one person followed by the actual possession of another. This, I think, must be its meaning; for, if no one succeed to the possession vacated or abandoned, there would be no one in whose favour or for whose protection the Act would operate. To constitute discontinuance there must be both dereliction by the person who has the right and actual possession to be protected. . . . In confirmation of these remarks, I may here refer to all the authorities which have been cited, and which prove, if proof was required, that *actual* possession is the object of the Statute and that to apply its provisions to any other case would be to violate its plain meaning and policy."

Possession of new-comer must be adverse to the former possessor :

This element is also necessary in order to constitute a dispossession or a discontinuance of possession.¹³ For, if the possession of the new-comer were not adverse to the former possessor, it would be consistent with the right of the former possessor and would therefore furnish no cause of action to him in respect of which time can run against him. Thus, when any person, whether a father or a stranger,

(1930) A I R 1930 Lah 303 (303) . 120 Ind Cas 792, *Mangal Singh v. Ali Sher* (Waste land—Possession is presumed to be with owner, and mere fact that owner has allowed his land to remain waste does not amount to discontinuance of possession)

(1923) A I R 1923 Rang 138 (139) 79 Ind Cas 817, *Maung Pwin v. Maung Po Maung* (Omission to cultivate the land does not amount to abandonment)

(1921) A I R 1921 Bom 368 (369) . 45 Bom 1020 62 Ind Cas 101, *Suamirao Shrinivas v. Bhimabai Padappa*.

(1929) A I R 1929 Pat 685 (694) . 9 Pat 447 . 122 Ind Cas 801, *Gopi Ram v. Jagannath Singh* (In the case of mineral rights non-user is not an abandonment of possession on the part of the owner)

[See (1930) A I R 1930 Lah 633 (634) 121 Ind Cas 733, *Sadda Singh v. Lehna Singh*

(1939) A I R 1939 Nag 7 (9), *Meherban Lall Pujara v. Yusufkhan Kallu Pujara* (It imports abandonment)

(1938) A I R 1938 Sind 198 (201) 178 Ind Cas 690, *Arab Jhanglu v. Panjalshah Yakubulshah* (It must be in the nature of an abandonment)

(1929) A I R 1929 Oudh 402 (405) 119 Ind Cas 866, *Mubimulnissa v. Ali Husain*.

(1900) 2 Bom L R 620 (621), *Bali Khatri v. Dnyanu Bahaji*.]

11a. (1929) A I R 1929 Cal 297 (297) . 56 Cal 914 119 Ind Cas 289, *Gaya Prasad v. Balyaman Das*.

12. (1847) 10 Ir L R 514. (Cited in A I R 1931 Bom 207 (203))

13. See cases cited in Foot-Note 6 ante

(1893) 1893 Pun Re No 104, *Sundar v. Mt Rohousu* (The terms 'dispossession' or 'discontinuance of possession' will not apply to the case of a permissive occupation by another or an occupation which recognises the proprietary right of another)

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enters upon the estate of an infant and continues in possession, the Court will consider such person entering only as guardian to the infant and his possession would be deemed to have begun as that of bailiff or agent of the minor and to have continued as such, until after the minor had arrived at the age of majority he did something to convert it into a wrongful possession on his own account. There is no dispossession or discontinuance of possession in such a case.¹⁴

10. Defendant must be in possession at the date of the suit.—The suit contemplated by Articles 142 and 144 being one for possession, i. e., for the dispossession of the defendant from the property of which possession is claimed,¹ it is clear that, at the date of the suit the defendant must be in possession.² A mortgaged property to B with possession and thereafter died. C, one of A's heirs, received the proprietary allowance from the mortgagee exclusively for several years. It was held that this would not constitute adverse possession of the mortgaged property inasmuch as, until redemption, the possession was with the mortgagee and none of A's heirs was entitled to the possession until redemption.³

11. "Possession," what is.—A possession *in fact* must be distinguished from a possession *in law*. A possession may exist in fact but not in law. Thus, the possession by a servant of his master's property is for some purposes not recognised as such by law, but is merely regarded as a detention or custody rather than possession.¹ Again, a possession may exist in law but not in fact. Thus, the owner of a diluviated land would in law be deemed to be in possession of the land notwithstanding that, actually, he could not have been in possession of it. Similarly, the owner of a land, who has parted with the surface rights therein, is deemed to be in possession of the subsoil, though as a matter of fact he is not in actual possession of it.² The possession thus attributed to him by law is known as

14. (1910) 8 Ind Cas 639 (642) . 12 Bom L R 956 (968, 969) : 35 Bom 79, *Vasudeo v. Ekmath*.

Note 10

1. See Note 8
2. (1928) A I R 1928 Oudh 155 (188) : 108 Ind Cas 617, *Abdul Halim Khan v. Saadat Ali Khan*
- (1926) A I R 1926 Cal 1166 (1168) . 97 Ind Cas 1003, *Birendra Nath Ray v. Satus Chandra Jourdar*.
3. (1880) 3 All 24 (35) (F B), *Umr-un-nissa v. Muhammad Yar Khan*.

Note 11

1. Salmond's Jurisprudence, 8th Edition, p. 224.
See (1861) 30 L J Q B 253 (256, 257) : 10 C B (N S) 227 : 7 Jur (N S) 948 : 128 R R 681, *White v. Bailey* (A servant, bailiff or any person occupying land in a merely ministerial character does not acquire possession (in a legal sense))
2. (1931) A I R 1931 P C 162 (164) : 132 Ind Cas 610 . 58 Ind App 228 : 59 Cal 60 (P C), *Bhupendra Narayan v. Rajeswar Prasad*.
- (1926) A I R 1926 Pat 130 (135) : 5 Pat 80 . 91 Ind Cas 169, *Midnapore Zamindari Co. v. Ram Kanai*.
- (1921) A I R 1921 Pat 234 (236) . 57 Ind Cas 744 : 5 Pat L Jour 632, *Gajadhar Prasad v. Dulhin Gulab Koer*. (Submerged land)

constructive possession. Such constructive possession is really nothing more than the right to take physical possession, and does not depend upon *user*.³

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Note 11

A possession *in fact* may be either in respect of a *corporeal* property, or in respect of an *incorporeal* right such as a right to an office, a dignity, or a monopoly. But in either case two elements must exist in order to constitute a possession in fact—the *animus possidendi* and the *corpus possessionis*. The former is the mental element and consists in the *intent to possess*. The latter is the physical element and consists in the concrete realisation of the intent by *actual user* of the thing sought to be possessed.⁴

What constitutes *corpus possessionis* in the case of *corporeal* property differs, however, to some extent from what may be necessary to constitute *corpus possessionis* in the case of *incorporeal* property. In the case of corporeal property it consists, according to Sir John Salmond, in the continuing exclusion of alien interference coupled with the *ability to use the thing oneself at will*. Actual use of it is not essential. In the case of incorporeal property it consists in actual continuous use and enjoyment, that being the only possible mode of exercise in such cases.⁵

It follows from the above discussion that acts of user without the *animus possidendi* or the intent to possess do not constitute possession at all and therefore do not constitute adverse possession.^{5a}

3 Salmond's Jurisprudence, 8th Edition, p 294

(1931) A I R 1931 P C 162 (164) 132 Ind Cas 610 58 Ind App 228 59 Cal 80 (P C), *Bhupendra Narayan v Rameswar Prasad*.

4. Salmond's Jurisprudence, 8th Edition, pp. 291 to 391

(1902) 27 Bom 43 (51) 4 Bom L R 721, *Tarubai v Venkat Rao*. (Possession of a right consists in the exercise of the right)

5. Salmond's Jurisprudence, 8th Edition, pp. 319, 320.

(1914) A I R 1914 All 267 (297) 26 Ind Cas 86, *Inayat Hussain v Secretary of State*

5a (1915) A I R 1915 Mad 720 (721) 24 Ind Cas 785, *Boyanna v Asethu* (Occupation for storing hay for 36 years does not by itself create title by adverse possession—But if there be *animus possidendi* manifested by transfers, presumption of title arises)

(1924) A I R 1924 Mad 197 (198, 199) 46 Mad 866 75 Ind Cas 39, *Taluk Board, Dindigul v Venkatarama Ayyar* (Gramanatham in Madras villages—Indiscriminate miscellaneous use by villagers does not amount to adverse possession)

(1873) 20 Suth W R 285 (285), *Ooma Churn Choudhry v Umbica Churn Dey* (Land used by neighbouring villages as a grazing common)

(1914) A I R 1914 Sind 119 (120) 8 Sind L R 331 29 Ind Cas 51, *Sultan Mahomed v Secretary of State*.

(1925) A I R 1925 Pat 210 (216) 3 Pat 915, 80 Ind Cas 544, *Narayan Singh v Dildar Ali Khan*

(1934) A I R 1934 All 883 (883) 153 Ind Cas 672, *Mahabir Singh v Sheo Shankar Singh* (A miscellaneous user such as making only a temporary use of the land for occasional necessities of a householder cannot create any title by adverse possession, a miscellaneous user of this sort is not possession at all)

(1922) A I R 1922 Lah 59 (59) 74 Ind Cas 282, *Bhuru v Datu Ram* (User of an intermittent nature accompanied by no assertion of right is a very common phenomenon in this country and arouses no opposition—Such user does not amount to adverse possession)

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Note 11**

Thus, mere acts of trespass without any intent to possess do not constitute adverse possession.⁶ The tying and grazing of cattle by a person without title on vacant or waste land, do not, in this country, excite any particular attention and are neither meant to denote nor understood as denoting an intent to possess, and consequently do not constitute possession.⁷ In the case of uncultivated and junglo land

(1900) 1 Ch 19 (23) : 81 L T 564 : 48 W R (Eng.) 177 : 16 T L R 44, *Littledale v. Lnerpool College*.

(1905) 8 Oudh Cas 177 (180, 181), *Sheo Narain Singh v. Dodal Singh*.

G. (1883) 7 Bom 323 (327) : 7 Ind Jur 613, *Anandray v. Shankar*.

(1925) A I R 1925 Pat 568 (569) : 88 Ind Cas 676, *Kedar Nath v. Amrita Mandal*.

(1935) A I R 1935 Cal 760 (761) : 159 Ind Cas 752, *Bhabani Prosanna v. Manindra Chandra*. (Adverse possession must be continuous. A series of isolated acts of trespass fall short of the requisite.)

(1923) A I R 1923 All 399 (400) 71 Ind Cas 265, *Lakhu v. Lalsingh*. (Temporary user which would be unnoticed or permissible would not amount to adverse possession.)

7. (1934) A I R 1934 Lah 960 (961) : 153 Ind Cas 964, *Labha Singh v. Municipal Commissioner, Amritsar*. (Non-payment of rent makes no difference)

(1900) 4 Ind Cas 314 (316) (F B) (Lah), *Bawa Naraingir v. Miran Bakhsh*.

(1916) A I R 1916 Lah 294 (294) : 36 Ind Cas 207, *Lachman Das v. Narsingh Das*

(1917) A I R 1917 Lah 394 (394) : 42 Ind Cas 412, *Fatteh Khan v. Bisakhi Ram* (Storing dung cakes and tying sheep on site is not sufficient to give a title by adverse possession.)

(1923) A I R 1923 Lah 25 (26) . 69 Ind Cas 4, *Mansa v. Khushali Ram*. (Acts of user over waste land such as tethering of cattle and storing fodder and grazing of cattle, are insufficient to establish adverse possession)

(1918) A I R 1918 Cal 844 (846) : 27 Ind Cas 640, *Mahabir Misser v. Nanda Kishore Misser*.

(1916) A I R 1916 Nag 90 (91) : 13 Nag L R 25 : 39 Ind Cas 54, *Radhakadas v. Harmohanlal* (Occasional tethering of cattle and stacking grass on vacant site is not dispossession of owner.)

(1926) 98 Ind Cas 880 (880) (Lah), *Nadar v. Shub Ram*. (User of a vacant site in a village abadi by tying up of cattle and keeping of heaps of dung is wholly insufficient to create an adverse title or to establish acts of ownership)

(1924) A I R 1924 Lah 370 (372) : 69 Ind Cas 573, *Waziri Mal v. Ganga Ram*. (Tying cattle and storing cowdung cakes on a vacant site.)

(1929) A I R 1929 Lah 432 (432) : 115 Ind Case 71, *Lajpat Rai v. Sohna*. (Tethering of cattle on a vacant site, keeping dung cakes and building a khurli)

(1934) A I R 1934 Lah 684 (685) : 154 Ind Cas 919, *Mt Aisha Bibee v. Allah Bakhsh*. (Where the defendant in proof of his plea of adverse possession over a certain land relies on various acts of enjoyment such as dumping of rubbish, tethering of cattle, enclosing land with wall, etc., such acts if they stood by themselves would not be sufficient to prove adverse possession on the part of the defendant, but they taken in conjunction with the fact that the defendant had enclosed the land in dispute which had been in existence for a period much longer than twelve years would be sufficient proof of adverse possession.)

(1912) 13 Ind Cas 467 (467) (Mad), *Peeranna v. Chelammayya*.

(1937) A I R 1937 Lah 492 (493) : 173 Ind Cas 971, *Dwarika Das v. Municipal Committee Amritsar*.

(1900) 4 Ind Cas 314 (315) (Lah), *Bawa Naraingir v. Mira Bakhsh*.

which produces nothing but self-sown trees and a seasonal crop of wild grass, it has been held by their Lordships of the Privy Council that sporadic invasions by the person without title and the grazing and carrying away of grass and the cutting of firewood do not amount to such possession as will enable him to prescribe for a good title.⁸ For other instances, see the undermentioned cases.⁹

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Note 11

(But see (1934) A I R 1931 Mad 274 (274) 148 Ind Cas 631, *Ramalinga Pandaram v. Anthonimuthu Vathiar*. (Mere storing manure and having cattle upon the land are not sufficient to establish adverse possession. But erection of a fence and enjoyment of fruit are clear acts of adverse possession.))

8. (1930) A I R 1930 P O 281 (282). 11 Lah 638 : 57 Ind App 273 : 127 Ind Cas 537 (P C), *Jahandad Khan v. Abdul Ghafur*.

9. (1917) A I R 1917 All 415 (416) : 42 Ind Cas 896, *Gajadhar v. Bhiman*. (Occupation of Banjar land by a tenant, in the shape of stacking cow-dung, erecting a kicha hut and the like, does not amount to adverse possession against the landlord.)

(1923) A I R 1923 All 557 (557, 559) : 74 Ind Cas 251, *Maqbul Hussain v. Ahmad Husain*. (Vacant land was being used by the Municipality for the deposit of refuse—Such user will not amount to adverse possession against the owner or dispossession of the owner.)

(1937) A I R 1937 All 238 (240) 169 Ind Cas 151, *Daya Shankar v. Debi Din*. (Isolated plot of plaintiff zamindar occupied by tenant of another zamindar—Attention of plaintiff not directed to question of whether it was in his mahal or in that of other zamindar—Plaintiff is deemed to be in constructive possession and there is no dispossession of the plaintiff.)

(1892) 16 Bom 338 (341), *Framji Cursetji v. Gokuldas Madhwaraj*. (Vacant site—Temporary acts of user without any claim of ownership being thereby intended is not adverse possession.)

(1924) A I R 1924 Lah 492 (492) 78 Ind Cas 152, *Mangat Ram v. Siraj-ul-Hasan*. (Merely burying dead bodies in waste land does not amount to dispossession so as to be adverse to the real owner.)

(1938) A I R 1938 Lah 324 (324) 176 Ind Cas 930, *Shah Nawaz v. Ghulam Shah*. (Waste land—Building of temporary chhappar, surrounded by ordinary enclosure of bushes, is not sufficient to constitute adverse possession.)

(1917) A I R 1917 Oudh 20 (23) 41 Ind Cas 80, *Rati Pal v. Bipin Chandra Chatterjee*. (Mere casual acts of cutting wood in a large tract of jungle or occasional acts of cultivation need not be treated as an ouster of the owner's possession.)

(1929) A I R 1929 All 428 (429) 116 Ind Cas 816, *Cheri v. Ramsewak*. (Planting by residents in the abadi of trees on vacant land near their houses cannot by itself be any evidence of the establishment of exclusive possession.)

(1927) A I R 1927 Cal 49 (50) 93 Ind Cas 849, *Nanda Kumar v. Emidad Ali*. (In the case of waste land the cutting of hogla which is a wild grass where it is not supposed to be the exclusive property of any one, is not an act of possession by any party.)

(1926) A I R 1926 Lah 615 (616) 97 Ind Cas 703, *Rulia v. Nur Mohammad*. (Erection and user of a cattle shed on a vacant site.)

(1933) A I R 1933 Bom 314 (317) 145 Ind Cas 408, *Secretary of State v. Jaterchand Panaji*. (The physical facts proved coupled with the evidence in the case proved adverse possession.)

(1920) A I R 1920 Cal 757 (758) 60 Ind Cas 386, *Moharaj Bahadur Singh v. Pulin Mal*. (Where with the intention of taking possession of a

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Note 11

Again, the mere existence of the *animus possidendi* will not be

strip of waste land belonging to the plaintiff, defendant deposits earth excavated from a tank and cuts the trees thereon and plaintiff sued more than 12 years afterwards to recover possession. *Held*, that the acts of defendant amounted to ouster of plaintiff.)

- (1929) A I R 1929 Lah 526 (527) : 117 Ind Cas 81, *Devi Ditta Ram v. Waryam* (Dumping of rubbish, tethering of cattle, etc., if they had stood by themselves, would not have been sufficient to prove adverse possession on the part of the defendant, but in conjunction with the fact that the defendant had enclosed the land in dispute with a wall which had been in existence for a period much longer than 12 years, were sufficient proof of his adverse possession.)
- (1926) A I R 1926 Lah 565 (566) : 96 Ind Cas 328, *Makhan v. Harnan Singh* (Depositing manure on a vacant site in an abadi without the actual possession of the site, does not amount to adverse possession.)
- (1923) A I R 1923 Lah 85 (35) : 69 Ind Cas 363, *Ram Das v. Chandu*.
- (1922) A I R 1922 Lah 325 (327) : 64 Ind Cas 876, *Birjoo v. Bhikhu*. (Where one of co-sharers sold a definite portion of the unpartitioned shamilat, which did not belong to him exclusively, and after the sale the stranger vendee occupied the land and enjoyed it precisely in the same way as

not having been shown that it was impossible in the nature of things for the strangers to occupy the land by corporal contact, the element of continuity and the necessary adversity have not been established)

- (1928) A I R 1928 Mad 1176 (1180) : 52 Mad 25 : 115 Ind Cas 40, *Secretary of State v. Kuthalanathuswami Temple* (Fugitive and intermittent acts of ownership would not establish any effective possession)
- (1926) A I R 1926 Mad 235 (236) : 92 Ind Cas 18, *Municipal Council, Cochin v. Davu Derussi*. (The act of sweeping the land occasionally by the municipality cannot be said to be adverse possession as against the real owner.)
- (1915) A I R 1915 Mad 720 (720) : 24 Ind Cas 735, *Pulloor Boyanna v. Golusu Asethu*.
- (1900) 1900 Pun L R p. 142 (143), *Devi Ditta v. Ida*. (The mere fact of certain

- (1879) 3 Bom 452 (584), *Bhasharappa v. Collector of North Kanara*. (Carrying on cultivations in different parts of a forest does not itself make one an owner of the forest.)

- (1924) A I R 1924 Lah 492 (492) : 78 Ind Cas 152, *Mangat Ram v. Siraj-ul-Hasan*. (Using land for burial purposes for more than twelve years does not constitute adverse possession.)
- (1928) A I R 1928 Lah 112 (112) : 106 Ind Cas 615, *Mukh Ram v. Harkesh*.
- (1926) 96 Ind Cas 452 (453) (Pat), *Hemat v. Karu Sahu*. (Mere throwing of rubbish and house sweeping on the land in dispute.)
- (1931) A I R 1931 Lah 489 (490) : 134 Ind Cas 294, *Nawab Khan v. Abdulla Khan*. (Erection of Khurli or mud trough and other such temporary and flimsy erections do not give rise to adverse possession.)
- (1927) A I R 1927 Lah 416 (417) : 102 Ind Cas 9, *Kunj Lal v. Ramji Lal*. (Planting of trees on common land is not adverse possession.)
- (1927) A I R 1927 Cal 97 (98) : 94 Ind Cas 5, *Mohendra Nath v. Nabadwip Chandra*. (Occasional user of land for the purpose of exercising a

sufficient without *actual use*.^{9a} Thus, the mere entry of a piece of land in the Revenue Records as Government waste does not transfer possession to Government.^{9b}

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Note 11

As regards the *corpus possessionis*, the nature of the requisite possession must vary with the nature of the subject possessed. The possession must be a kind of possession of which the particular subject is susceptible.¹⁰ A forest land on hills, very little of it being capable of cultivation, "is far removed as a subject of definite possession from lands under continuous and permanent cultivation,

(See also (1922) A I R 1922 All 50 (51) 70 Ind Cas 483, *Md Shafi v. Bindeshari Singh* (Planting of trees on another person's land is active trespass))

(1929) A I R 1929 Oudh 328 (330) : 114 Ind Cas 815, *Jagatjit Singh v. Muhammad Asghar Ali* (Every owner must be presumed to know the boundary of his own land and if he allows another person to cross that boundary and occupy an area of at least 25 acres, possibly more, and plant thereon a number of trees and forbid the owner's men to enter the land, and this possession extends for a period of over 12 years, it must be held that a title has been obtained by adverse possession))

9a (1934) 67 Mad L Jour 43 (N R C) (Where the land is a waste land, mere assertion of hostile title by another and a sale of the land by him to a third party is not sufficient to disturb the true owner)

(1929) A I R 1929 Pat 645 (693) 9 Pat 447 122 Ind Cas 801, *Gopiram v. Jagannath Singh* (Defendant not owner of sub-soil granting lease to X, in 1887—Lessee working mines only in 1913—X cannot be said to be in possession from 1887.)

(1927) A I R 1927 Cal 117 (121) : 101 Ind Cas 62, *Pannalal Ghose v. Adyar Coal Co., Ltd.* (Asserting possession in a written statement is not sufficient to show possession)

(1933) A I R 1933 Nag 202 (203, 204) 142 Ind Cas 493 · 29 Nag L R 187, *Mt Manju v. Gulab Rao* (Mere continuation of name in the mutation register does not amount to adverse possession)

9b (1914) 24 Ind Cas 813 (818) 7 Sind L R 169, *Secretary of State v. Mushtak Singh*

(1911) 10 Ind Cas 363 (365) (Cal), *Joy Kali Roy Choudhury v. Hemangini Devi*

(1913) 18 Ind Cas 811 (813) (All), *Ganga Sahai v. Kanhaiya Lal*,

(See also (1919) A I R 1919 Oudh 80 (82) 22 Oudh Cas 369 54 Ind Cas 317, *Bhagwan Datt Singh v. Sant Prasad*, (Where there was no invasion of plaintiff's rights beyond certain entries in the settlement khewat no question of adverse possession arises.)

(1907) 6 Cal L Jour 472 (486), *Mu Waznuddin v. Lala Deok Nandan*)

10 (1934) A I R 1934 P C 23 (25) 147 Ind Cas 545 61 Ind App 78 · 61 Cal 262 (P C), *Secretary of State v. Debendra Lal Khan*

(1922) A I R 1922 P C 181 (181, 182) 66 Ind Cas 151 48 Ind App 395 44 Mad 883 (P C) *Kuthali Moothar v. Kunharan Kutty*

(1914) A I R 1914 Cal 762 (763) 23 Ind Cas 136, *Hemchandra v. Secretary of State* (It is as unnecessary as it would be impossible for the grantee of a fishery to exercise his rights over every part of the fishery in order to avoid losing them by lapse of time)

(1903) 31 Cal 397 (405), *Wali Ahmed Choudhry v. Tota Meah Choudhry* (Acts indicative of possession must vary according to the nature of the property over which possession is exercised and in the case of waste lands, the cutting of grass and grazing of cattle would be the ordinary acts by which possession would be asserted. But where the acts are being done by persons on the waste lands of their landlords, the principle can only apply, if the acts done were such as to amount to an assertion of possession adverse to the landlords, and were not acts which were done with their permission)

**Arts. 142 & 144
Notes 11-12**

compactly situated and capable of being remembered with identification as the lands held and occupied in articulate plots or under leases."¹¹ The Crown, in the case of a fishery belonging to it, exercises its rights by granting leases or licences to fish; it does not itself fish. Consequently the granting, by a person other than the Crown, of leases or licences to fish in the case of a fishery which *prima facie* belongs to the Crown is evidence of usurpation by that person of the distinctive rights of the Crown and is thus most significant evidence of adverse possession.¹²

Where a person entitled to possession enters in the assertion of that possession, the law vests the actual possession in him. If there are two persons in a field each asserting that the land is his, and each doing some act in the assertion of the right of possession and if the question is which of these two is in actual possession, it must be held that the person who has the title is in actual possession and the other person is a trespasser.¹³

12. Possession of part, if possession of whole. — It is a well settled proposition of law that in the case of a rightful owner of property, proof of actual possession of a part of the property will be sufficient to prove his possession of the whole, except such portions of it as may be in the actual possession of another.¹ But, in the case of a trespasser, claiming to be in adverse possession against the true owner, the trespasser will not be deemed

(1935) 163 Ind Cas 897 (902) · 63 Cal 800, *Surendra Kumar Roy Chowdhury v. Ahmed Nawab Choudhury*.

(1938) A I R 1938 Mad 454 (455) : 178 Ind Cas 801, *Atchayya Patrudu v. Jalaluddin Sahib*.

(1917) A I R 1917 P C 18 (22) : 44 Ind App 104 · 41 Cal 858 : 40 Ind Cas 337, *Basant Kumar Roy v. Secretary of State*.

(1910) 7 Ind Cas 700 (701) (Cal), *Raj Krishna v. Muktaram Das*.

(1928) A I R 1928 Oudh 470 (471) : 110 Ind Cas 569, *Md. Hasan Ali v. Har Nath Kuer*.

(1926) A I R 1926 Pat 130 (135) · 5 Pat 60 · 91 Ind Cas 169, *Midnapur Zamindary Co. v. Ram Kanai Singh Deo*.

(1908) 5 Cal 229 (230) · 3 Cal 417 · 10 Cal 100 · Lord Lovat.

· Young.

: 105 L T 587 : 55 S J 686 : 27

(1908) 7 Cal L Jour 414 (421) · 12 Cal W N 273 : 3 Mad L Tim 212, *Mirza Shamsher Bahadur v. Kunj Behari Lall*.

(1934) A I R 1934 Cal 294 (295) : 149 Ind Cas 1109, *Nalaki v. Abhoya Chandra Sil*.

(1938) A I R 1938 Sidd 182 (141) : 176 Ind Cas 549, *Tahilram Tachchand v. Mt. Miral*.

11. (1922) A I R 1922 P C 181 (181, 182) · 66 Ind Cas 451 : 48 Ind App 395 : 41 Mad 883 (P C), *Kuthali Moothazhar v. Kunharan Kutty*.

12. (1934) A I R 1934 P C 23 (25) · 147 Ind Cas 545 · 61 Ind App 78 : 61 Cal 262 (P C), *Secretary of State v. Debendralai Khan*.

13. (1909) 4 Ind Cas 442 (447) (Cal), *Bulhumukhi Das v. Jitendra Nath Roy*.

Note 12

1. (1901) 26 Bom 410 (416) : 4 Bom L R 28, *Vithaldas v. Secretary of State*.

(1936) 164 Ind Cas 452 (454, 455) (Cal), *Durgaram Chaudhury v. Amrta Chandra*.

to be in possession of the whole of a property merely because he is in possession of a part of it.² The reason is that, as will be seen in Note 53 *infra*, in order to constitute adverse possession, the

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Note 12

- (1908) 3 Mad L Tim 212 (220) : 12 Cal W N 273 · 7 Cal L Jour 414, *Merza Shamsheer Bahadur v. Munshi Kunj Behari Lal*.
- (1921) A I R 1921 Pat 879 (389) 57 Ind Cas 786 5 Pat L Jour 563, *Ramlal v. Satya Niranjan Chakravarti*.
- (1938) A I R 1938 Pat 222 (223) , 17 Pat 210 , 175 Ind Cas 165, *Chandra Mohan Singh v. Butu Mian* (Large area of waste land settled with tenant—Cultivation of bulk of demised land amounts to enjoyment of possession for purposes of Article 142 in absence of specific acts of adverse possession)
2. (1906) 24 Cal 256 (259) : 1 Cal W N 304, *Mohini Mohan Roy v. Promoda Nath Roy*.
- (1903) 31 Cal 307 (404), *Wals Ahmed v. Tota Meah*.
- (1907) 34 Cal 753 (774) 5 Cal L Jour 583 : 12 Cal W N 193, *Brojo Nath Bose v. Durga Pershad Singh*.
- (1935) 163 Ind Cas 897 (902) · 63 Cal 300, *Surendra Kumar Roy v. Ahmed Nawab*.
- (1935) 164 I C 452 (454) (Cal), *Durgaram Choudhury v. Amrita Chandra*.
- (1904) 9 Cal W N 292 (300), *Bagdu Majhi v. Durga Prasad Singha*.
- (1915) A I R 1915 Cal 464 (473) . 29 Ind Cas 156, *Amrita Sundari v. Sheerajuddin Ahmed*.
- (1919) A I R 1919 Cal 782 (795) . 47 Ind Cas 315 (S B), *Shib Chandra Roy v. Harendra Lal Rai*.
- (1921) A I R 1921 Cal 277 (282) 66 Ind Cas 923, *Maharaja of Cooh-Bebar v. Mahendra Ranjan Rai Chaudhury*.
- (1925) A I R 1925 Cal 981 (983) 85 Ind Cas 594, *Abhoy Sanlar v. Satyendra Prasanna*.
- (1927) A I R 1927 Cal 117 (121) : 101 Ind Cas 62, *Panna Lal Ghose v. Adja Coal Co. Ltd*.
- (1935) A I R 1935 Cal 760 (762) 159 Ind Cas 752, *Dhabani Prasanna Lahiri v. Manendra Chandra Roy*.
- (1930) A I R 1930 Lah 76 (77) 120 Ind Cas 531, *Mohammad Sadiq v. Allah Baksh*.
- (1930) A I R 1930 Lah 303 (304) 120 Ind Cas 792, *Mangal Singh v. Ali Sher*.
- (1914) A I R 1914 Mad 380 (390) 23 Ind Cas 520, *Karia Kownden v. Raghava Reddi*.
- (1908) 3 Mad L Tim 212 (220) 12 Cal W N 273 7 Cal L Jour 414, *Merza Shamsheer Bahadur v. Munshi Kunj Behari Lal*.
- (1928) A I R 1928 Oudh 470 (471) . 110 Ind Cas 569, *Mahomed Hasan Ali v. Harnath Koer*.
- (1932) A I R 1932 Oudh 135 (137) 135 Ind Cas 689, *Indar Gur v. Special Manager, Court of Wards, Balrampur Estate*.
- (1936) A I R 1936 Oudh 207 (208, 209) 165 Ind Cas 104, *Ramzan v. Md. Ahmed Khan*.
- (1936) A I R 1936 Oudh 387 (396) 164 Ind Cas 118, *Pantap Bahadur Singh v. Jagatjit Singh*.
- (1920) A I R 1920 Pat 383 (394) 55 Ind Cas 113, *Lodna Colliery Co., Ltd v. Bipin Behari Bose*.
- (1920) A I R 1920 Pat 542 (546) 56 Ind Cas 184 . 5 Pat L Jour 273, *Pramatha Nath v. A. J. Meik*.
- (1921) A I R 1921 Pat 879 (389, 390) . 57 Ind Cas 786, *Ram Lal Kari Raj v. Satya Niranjan*.
- (1924) A I R 1924 Pat 402 (416) 83 Ind Cas 205 3 Pat 85, *Sashi Bhushan v. Ramjas Agarwalla*.
- (1927) A I R 1927 Oudh 209 (209) . 101 Ind Cas 714, *Saikh Hussain v. Elwad Hussain*.
- (1929) A I R 1929 Pat 685 (693) 9 Pat 447 : 122 Ind Cas 801, *Gopi Ram v. Jagarnath*.

Arts. 142 & 144 possession must be *actual*. In other words, the trespasser's adverse
Note 12 possession must be confined to the area *actually* occupied by him,³
 and mere constructive possession on the part of a person will not
 enable him to prescribe for a title by adverse possession.⁴ But, what
 constitutes actual possession of the whole of a property by a
 trespasser depends on the circumstances of each case.⁵

Illustrations

1. Possession of a part by a trespasser will be evidence of possession of any other part also, where the two parts are so closely

(1931) A I R 1931 Pat 486 (439) 183 Ind Cas 453, *Dajinath Jugal Kishore v. Manindra Chandra Nandi*.

(1909) 2 Ind Cas 63 (65) 12 Oudh C 15 58, *Maheswar Baksh Singh v. Pratap Bahadur Singh*.

(1910) 6 Ind Cas 359 (300) (Cal), *Baroda Prasad v. Annoda Mohan*.

(1910) 6 Ind Cas 392 (397) (Cal), *Nauab Bahadur of Murshidabad v. Gopinath Mandal*.

(1911) 10 Ind Cas 742 (744) (All), *Zahuram v. Rahim*.

(1922) 65 Ind Cas 749 (752) (Oudh), *Durga v. Ram Padarath*.

(1935) A I R 1935 Pat 33 (36) 13 Pat 517 156 Ind Cas 136, *Muktakeshi Patrani v. Midnapur Zemindary Co Ltd* (Removal of comparatively small quantity of minerals is not sufficient to constitute adverse possession. There must be complete exclusion of the true owner. Adverse possession affects only minerals for which possession has been proved.)

3. (1936) 163 Ind Cas 897 (902) 63 Cal 300 (312), *Surendra Kumar Roy v. Ahmed Nawab Chowdhury*.

(1930) A I R 1930 Lah 303 (304) 120 Ind Cas 792, *Mangal Singh v. Ali Sher*.

(1930) A I R 1930 Oudh 374 (376) 126 Ind Cas 675, *Sohan Lal v. Saikh Mohammad Hussain*.

(1926) A I R 1926 Pat 385 (391) 96 Ind Cas 1027, *Keshabji Pitambar v. Shashi Bhusan*.

(1927) A I R 1927 Oudh 209 (209) 101 Ind Cas 714, *Sadik Husain v. Elizad Husain*.

[But see (1924) A I R 1924 Lah 389 (392) 71 Ind Cas 805, *Muhamamad Hassan v. Sohara*. (If land is partly cultivated and partly uncultivated and the plaintiff acquires title to the former by adverse possession, he also acquires title to the latter.)]

4. (1908) 35 Cal 961 (972) 6 Cal L Jour 735 12 Cal W N 127, *Jogendranath Rai v. Baldev Das Marwari*.

(1906) 3 Cal L Jour 316 (331), *Ananda Hari v. Secretary of State*.

(1908) 7 Cal L Jour 414 (423) 12 Cal W N 273 3 Mad L Tim 212, *Mirza Shamsheer Bahadur v. Kunj Behari Lall*.

(1919) A I R 1919 Cal 782 (795) 47 Ind Cas 315 (S B), *Shub Chandra Roy v. Harendra Lal Rai*.

(1924) A I R 1924 Cal 855 (863) 51 Cal 609 78 Ind Cas 679, *Suresh Chandra v. Shiti Kanta*.

(1925) A I R 1925 Cal 270 (271) 81 Ind Cas 279, *Girish Chandra Pal v. Baikuntha Nath*.

(1925) A I R 1925 Cal 931 (933) 85 Ind Cas 594, *Abhoy Sanhar v. Satyendra Prasanna*.

(1935) A I R 1935 Cal 760 (761) 159 Ind Cas 752, *Bhabani Prosanna Lahiri v. Manindra Chandra Roy*.

(1928) A I R 1928 Oudh 470 (471) 110 Ind Cas 569, *Mohammad Hussain Ali v. Harnath Kuer*.

(1930) A I R 1930 Pat 20 (23) 124 Ind Cas 634, *Shyam Kreshito Shaw v. Ganesh Kahar*.

5. (1920) A I R 1920 Mad 295 (301) 53 Ind Cas 689, *Secretary of State v. Venkatanarasimha Naidu*. (Held, in the circumstances of the case that the adverse possessor was in possession of the whole.)

connected or interdependent that the possession of either of them can be treated as possession of the other.⁶

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Notes 12-14

2. Where a tract of land with a defined boundary has been throughout claimed by a person as owner and acts of ownership have been done upon various portions of it, such acts of enjoyment may be accepted as evidence of the possession of the whole.⁷

3. Where the defendant worked certain quarries belonging to the plaintiff in all parts of the land openly without objection or opposition, it was held that they worked the quarries in such a way as to prove possession of the whole.⁸

13. Possession of house is possession of site.—The possession of a house is also the possession of the site on which that house stands and if the house has been in adverse possession for more than twelve years, a suit for the recovery of the site is barred.¹

14. Plaintiff only in constructive possession—Dispossession or discontinuance of possession.—As has been seen in Note 9 *ante*, a dispossession or a discontinuance of possession necessarily involves the position that the *plaintiff* must have been in *actual* possession or possession in fact and must have been driven out or must have gone out of such possession. Where therefore the plaintiff is *only in constructive* possession or possession *in law* of the property, there can be no dispossession or discontinuance possible in the sense in which it is used in Article 142. But there may, nevertheless, be an adverse actual possession of such property. Thus, where the owner of land makes a grant of the surface rights thereof to another, he remains, as has been seen in Note 11 *ante*, in the eye of law in possession of the subsoil *constructively*. But a third person may without right work mines in the subsoil and this would clearly be in actual adverse possession. A suit by the owner for possession of the subsoil by driving out the intruder would be governed, not by Article 142 but by Article 144.¹

6. (1924) A I R 1924 Cal 855 (861) 78 Ind Cas 679 51 Cal 669, *Suresh Chandra v Shri Kanta*.

(1935) 164 Ind Cas 452 (455) (Cal), *Durgaram Chaudhury v Anrta Chandra*.

7 (1927) A I R 1927 Lah 753 (754) 99 Ind Cas 693, *Nizam Din v Ali Mohammad*

(1886) 9 Mad 285 (304, 305) *Sivasubramanya v Secretary of State*.

(1925) A I R 1925 Sind 201 (203) 62 Ind Cas 861, *Ramzan v Fakir Muhammad*

(1911) 9 Ind Cas 9 (10) 34 Mad 353, *Subramania Pillai v Secy of State*.

8 (1927) A I R 1927 Cal 956 (960) 55 Cal 35 106 Ind Cas 117, *Rajeswar Prosad v Bhupendra Narayan*

Note 13

1. (1910) 6 Ind Cas 683 (689) (Mad), *Nuradin Kasim v Morris Sebastian Pereira*.

Note 14

1. (1931) A I R 1931 P C 162 (164) 132 Ind Cas 610 58 Ind A1 p 223 . 59 Cal 80 (P C), *Bhupendra Narayan v Rajeswar Prosad*

**Arts. 142 & 144
Note 15**

15. Principle that possession follows title. — It is a fundamental principle that possession is *presumptive evidence of a seisin in fee* until the contrary is shown.¹ In *Jones v. Smith*,² Vice-Chancellor Wigram observed that "possession is *prima facie* evidence of a seisin in fee," and in *Asher v. Whitlock*,³ Cockburn, C. J., observed "I take it to be established authority that possession is good against all the world except the person who can show a better title than the one in possession."

Possession is, therefore, *prima facie* a good title against all but the true owner,⁴ and this is recognised by Section 110 of the Evidence Act which runs as follows :

(1925) A I R 1925 P C 42 (43) : 4 Pat 244 52 Ind App 109 : 86 Ind Cas 289 (P C), *Satya Niranjan v. Ram Lal*.

Note 15

1. (1852) 6 Bom 215 (224) : 6 Ind Jur 416 (F B), *Pemraj Bhatani Ram v. Narayan Shivrām*.
- (1863) 10 Moo Ind App 47 (58) 2 Sar 65 (P C), *Zamindar of Ramnad v. Zamindar of Yethiappooram*. (In the absence of clear title in the defendant, the plaintiff is entitled to succeed on his prior long possession if dispossessed—A in possession for 20 years dispossessed by B—Suit by A against B—Neither party showing title—A's possession must prevail as being sufficient proof of title)
- (1930) A I R 1930 Cal 411 (418) : 126 Ind Cas 769, *Taraheswar Pal v. Satish Kanta Roy*.
- (1936) A I R 1936 Bom 201 (209) 163 Ind Cas 632, *Govindbhai v. Dahya-bhai*. (Such presumption is rebuttable)
- (1915) A I R 1915 Cal 128 (128) . 41 Cal 894 . 25 Ind Cas 76, *Adhar Chandra v. Dibakar Bhuyan*.
- (1867) 7 Suth W R 485 (486), *Gopeenath Doss v. Dyanidhee Sundura Mohapattur*.
- (1929) A I R 1929 Cal 149 (157) : 118 Ind Cas 566, *Khantamoy Debi v. Hirdayananda Bhattacharjee*.
- (1885) 9 Mad 285 (304), *Suasubramanya v Secretary of State*.
- (1866) 6 Suth W R 82 (83), *Gooroo Pershad v. Byhunto Chunder Roy*. (Evidence of possession and enjoyment is good evidence of title as against the real owner only where it has been undisputed and continuous.)
- (1912) 16 Ind Cas 955 (956) (Mad), *Gopalaswamy Chetty v. Secretary of State* with respect
- (1868) _____ Singh.
- (1869) _____ Ghose v. _____
Kailas Nath Sidhanta.
- (1869) 12 Suth W R 315 (316), *Joykishen Mookerjee v. Raj Kishen Mookerjee*.
- (1872) 17 Suth W R 490 (492), *Lallee Singh v. Mt. Amrit Kooer*.
[See (1868) 9 Suth W R 98 (100), *Mt. Woosterun v. Noorul Jan*.]
2. (1811) 58 R R 22 (31) : 1 Hare 43 : 11 L J Ch 83.
3. (1865) 148 R R 598 (602) 14 W R (Eng) 26 : L R 1 Q B 1 : 35 L J Q B 17 : 11 Jur (N S) 925 , 13 L T (N S) 251
4. (1852) 6 Bom 215 (222, 223) . 6 Ind Jur 416 (F B), *Pemraj Bhatani Ram v Narayan Shivrām*.
- (1909) 10 Bom L R 571 (573), *Bhagwant Singh v. Secretary of State*.
- (1904) 27 All 169 (171) 1 All L Jour 625 : 1904 All W N 222, *Pahlwan Singh v Ram Dharose*. (It is an interest in the property which is heritable and alienable)
- (1922) A I R 1922 All 277 (278) : 66 Ind Cas 529, *Rameshwar Dube v. S. H. Dube*.
- (1889) 1889 Bom P J 309, *Sakatchand v. Sundarlal*.

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

Arts. 142 & 144
Note 15

The converse of the above principle is also a well recognised principle, namely that title ordinarily carries with it the presumption of possession and that, where the question is as to who was in possession of a land, the presumption is that the true owner was in possession, in other words, *that possession follows title*.⁵ This,

- (1896) 1896 Bom P J 200, *Mt Gitabas v. Dattubowa*.
 (1912) 15 Ind Cas 97 (98, 99) (Mad), *Adinarayana Iyer v. Krishnan*.
 (1929) 118 Ind Cas 680 (680) (Nag), *Nago v. Rajeshwar Sansthan Akola*.
 (1916) A I R 1916 All 241 (242) · 84 Ind Cas 952, *Anand Sarup v. Chawua*.
 (Plaintiff proving title—Defendant's possession though long, not proved to be adverse to plaintiff—Plaintiff decreed possession)
 (1902) 24 All 157 (159) 1901 All W N 201, *Gobind Prosad v. Mohan Lal (Do)*.
 (1885) 9 Bom 187 (140), *Ramachandra Apaji v. Balaji Bhaurav*.
 (1925) A I R 1925 Mad 1021 (1022) · 91 Ind Cas 503, *Gangayya v. Satyanarayana* (This defence cannot avail a defendant when the true owner himself is also a party to the suit)
 [See also (1869) 9 Suth W R 120 (120, 121), *Puran Chunder v. Protap Narain*]
 5. (1847) 76 R R 794 (799) 2 Ex 803, 18 L J Ex 456, *Jones v Chapman* (Per Maule J)
 (1934) A I R 1934 Bom 207 (209) · 149 Ind Cas 882 & 885 · 58 Bom 397 & 406 (F B), *Krishnaji v. Madhusa*.
 (1927) A I R 1927 Mad 1094 (1095) 99 Ind Cas 971, *Kunhi Moidin v. Pakkar Kutty*.
 (1902) 26 Bom 410 (416) 4 Bom L R 28, *Vithaldas v. Secretary of State*.
 (1925) A I R 1925 Bom 27 (27) 76 Ind Cas 591, *Secretary of State v. Lakshminshanhar* (The open space between the houses presumably belongs to the owners of the surrounding houses)
 (1904) 8 Cal W N 876 (880), *Kasturi Singh v. Bissen Pragas Narain Singh*.
 (1924) A I R 1924 Cal 977 (978) 79 Ind Cas 1038, *Kali Prosanna Bahadur v. Hemanta Kumar Deb*.
 (1931) A I R 1931 Cal 501 (502) 134 Ind Cas 319, *Jira Bewa v. Uma Charan Saha*. (It is not necessary that it must be shown that the land was incapable of enjoyment before the presumption is drawn)
 (1932) A I R 1932 Cal 634 (637, 638) 141 Ind Cas 320, *Galstain v. Profulla Kumar De*.
 (1933) A I R 1933 Cal 199 (203) 142 Ind Cas 525, *Sarat Chandra v. Bhoo-pendra Narain* (Newly formed Chur lands—Both parties scrambling for possession—Possession follows title)
 (1926) A I R 1926 Lah 13 (14) 89 Ind Cas 995, *Ismail v. Ibrahim*.
 (1927) A I R 1927 Nag 37 (37) 97 Ind Cas 1006, *Tukaram Dajirao v. Tukaram Yeshwant*.
 (1920) A I R 1920 Oudh 50 (52) 56 Ind Cas 720, *Janaki Saran v. Widow of Mahomed Sadiq*.
 (1925) A I R 1925 Oudh 170 (171) 81 Ind Cas 588, *Subbhan Pande v. Mahesh Prasad*.
 (1926) A I R 1926 Oudh 528 (529) 96 Ind Cas 225, *Siddhnath v. Darjor Singh* (Plaintiff can invoke the presumption that possession follows title, if he proves ownership up to the time immediately preceding 12 years where manifest acts of enjoyment cannot be proved)
 (1927) A I R 1927 Oudh 141 (142) 1 Luck 441 29 Oudh Cas 395 98 Ind Cas 704, *Darjor Singh v. Sidh Nath* (A I R 1926 Oudh 528, Overruled)
 (1910) 7 Ind Cas 700 (701) (Cal), *Raj Krishna v. Mukhtaram Das*

(1889) 1889 Bom P J 309, *Sakalchand v. Sundarlal*.

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." Arts. 142 & 144
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- (1896) 1896 Bom P J 200, *Mt. Gitabai v. Dattuboua*.
 (1912) 15 Ind Cas 97 (98, 99) (Mad), *Adinarayana Iyer v. Krishnan*.
 (1929) 118 Ind Cas 680 (680) (Nag), *Nago v. Rajeshwar Sansthan Akola*.
 (1916) A I R 1916 All 241 (242) - 34 Ind Cas 952, *Anand Sarup v. Chawua*.
 (Plaintiff proving title—Defendant's possession though long, not proved to be adverse to plaintiff—Plaintiff decreed possession.)
 (1902) 24 All 157 (153) 1901 All W N 204, *Gobind Prasad v. Mohan Lal (Do)*.
 (1885) 9 Bom 137 (140), *Ramachandra Apaji v. Balaji Bhaurai*.
 (1925) A I R 1925 Mad 1021 (1022) 91 Ind Cas 503, *Gangayya v. Satiyanarayana* (This defence cannot avail a defendant when the true owner himself is also a party to the suit)
 [See also (1869) 9 Suth W R 120 (120, 121), *Puran Chunder v. Protap Narain*]
 5 (1847) 76 R R 794 (799) 2 Ex 803. 18 L J Ex 456, *Jones v. Chapman* (Per Maule J)
 (1934) A I R 1934 Bom 207 (203) 149 Ind Cas 882 & 885 : 58 Bom 397 & 406 (F B), *Krishnaji v. Madhusa*.
 (1927) A I R 1927 Mad 1094 (1095) - 99 Ind Cas 971, *Kunhi Moidin v. Pak-lar Kutty*
 (1902) 26 Bom 410 (410) 4 Bom L R 28, *Vithaldas v. Secretary of State*.
 (1925) A I R 1925 Bom 27 (27) 76 Ind Cas 591, *Secretary of State v. Lakshmishankar* (The open space between the houses presumably belongs to the owners of the surrounding houses)
 (1901) 8 Cal W N 876 (880), *Kasturi Singh v. Bissen Pragas Narain Singh*.
 (1924) A I R 1924 Cal 977 (978) 79 Ind Cas 1038, *Kali Prosanna Bahaduri v. Hemanta Kumari Devi*.
 (1931) A I R 1931 Cal 501 (502) 134 Ind Cas 319, *Jira Bewa v. Uma Charan Saha* (It is not necessary that it must be shown that the land was incapable of enjoyment before the presumption is drawn.)
 (1932) A I R 1932 Cal 634 (637, 638) 141 Ind Cas 320, *Galstain v. Profulla Kumar De*
 (1933) A I R 1933 Cal 190 (203) 142 Ind Cas 525, *Sarat Chandra v. Bhoo-pendra Narain* (Newly formed Chur lands.—Both parties scrambling for possession—Possession follows title)
 (1926) A I R 1926 Lah 13 (14) 89 Ind Cas 995, *Ismail v. Ibrahim*.
 (1927) A I R 1927 Nag 37 (37) 97 Ind Cas 1006, *Tukaram Bajnao v. Tukaram Yeshwant*
 (1920) A I R 1920 Oudh 50 (52) . 56 Ind Cas 720, *Janhi Saran v. Widow of Mahomed Sadiq*
 (1925) A I R 1925 Oudh 170 (171) 81 Ind Cas 588, *Subdhan Pande v. Mahesh Prasad*
 (1926) A I R 1926 Oudh 528 (529) 96 Ind Cas 225, *Siddh Nath v. Barjor Singh*. (Plaintiff can invoke the presumption that possession follows title, if he proves ownership up to the time immediately preceding 12 years where manifest acts of enjoyment cannot be proved)
 (1927) A I R 1927 Oudh 141 (142) 1 Luck 411 29 Oudh Cas 395 : 98 Ind Cas 704, *Barjor Singh v. Siddh Nath* (A I R 1926 Oudh 528, Overruled)
 (1910) 7 Ind Cas 700 (701) (Cal), *Raj Krishna v. Mukhtaram Das*.

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however, is not always a *presumption of law*, which a Court is bound to draw in all cases.⁶ There is no provision corresponding to Section 110 of the Evidence Act providing that a person who has the title *should* be presumed to be in possession. But such a presumption *may* be drawn under Section 114 of the Evidence Act⁷ which runs as follows.

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

In *Kashinath v. Ganesh*,⁸ Mr. Justice Fawcett observed as follows:

"It is not an absolute presumption of law, but a purely discretionary one depending upon the particular circumstances of each case. This conforms with the provisions of the Evidence Act, for though Section 110 recognised a presumption that a person in possession has also a good title, there is no corresponding Section saying that the person with the title should be presumed to be in possession. This presumption is one that can only come under Section 114 of the Evidence Act, which allows the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events."

The presumption is thus one of *fact* and the Court has a *discretion* to draw it or not having regard to the circumstances of the case.^{8a} As in the case of the exercise of discretion of every kind, this discretion also must be exercised on judicial principles. The presumption will not, of course, apply where there is definite evidence to the

(1909) 4 Ind Cas 442 (447) (Cal), *Bidhumulhi Dasi v. Jitendra Nath Roy*.

(1918) 45 Ind Cas 217 (217) (Nag), *Raghoba v. Palhoba*.

(1909) 4 Ind Cas 619 (620) (Mad), *Sundara Sastrial v. Gorinda Mandarayan*.

(1917) A I R 1917 Pat 471 (473) 41 Ind Cas 114 2 Pat L Jour 506, *Midnapore Zamindari Co. Ltd. v. Panday Sardar*.

(1891) L R 2 Q B 18 (27) 63 L J Q B 513 : 9 R 407 : 70 L T 788. 1 Manson 181, *Ramsay v. Margaret*.

(1923) 111 Ind Cas 376 (377) (Oudh), *Sant Baksh v. Ram Nath*

[See also (1927) A I R 1927 Lah 777 (778) : 100 Ind Cas 336, *Dullah v. Mt. Sardaran*

(1914) A I R 1914 Upp Bur 44 (45) : 27 Ind Cas 931, *Nga Po v. Nga So Pe*.

(1931) A I R 1931 Lah 529 (529) : 148 Ind Cas 820, *Aya Singh v. Latif*. (1869) 9 Suth W R 556 (557), *Shahabooddeen Chowdhry v. Ram Guttay Chuckerbutty*.]

6. (1927) A I R 1927 Mad 509 (511) 101 Ind Cas 813, *Venkata Somayajulu v. Suryanarayana*.

7. (1923) A I R 1923 Bom 361 (363) : 77 Ind Cas 506, *Kashinath Gyanoba v. Ganesh Sitaram*

8. (1923) A I R 1923 Bom 361 (362, 363) : 77 Ind Cas 506

8a (1921) A I R 1921 Pat 153 (160) 58 Ind Cas 774 : 5 Pat L Jour 721, *Inder Lal v. Ram Surat Kuer*.

[See also (1915) A I R 1915 Cal 631 (634) : 27 Ind Cas 802, *Sarojini Devi v. Kartabash Das*]

contrary.^{8b} In *Runjeet Ram Panday v. Goburdhun Ram Panday*,⁹ Arts. 142 & 144 their Lordships of the Privy Council observed as follows. Note 15

- "Now the ordinary presumption would be that possession went with the title. That presumption cannot be, of course, of any avail in the presence of clear evidence to the contrary; but, where there is strong evidence of possession, as there is here, on the part of the respondents—opposed by evidence, apparently strong also on the part of the appellant—their Lordships think that in estimating the weight due to the evidence on both sides, the presumption may under the peculiar circumstances of this case be regarded."

In *Rani Hemanta Kumari Debi v. Maharajah Jagadindra Nath Roy Bahadur*,¹⁰ their Lordships of the Privy Council again expressed a similar view. They said.

"It is for the appellant, as plaintiff in a suit for ejectment, to prove possession prior to the dispossession which she alleges. At the same time their Lordships consider that in this question of evidence the initial fact of the appellant's title comes to her aid with greater or less force according to the circumstances established in the evidence."

In the case of open, waste or jungle lands, which do not admit of enjoyment by acts of ownership in the same manner as other property,¹¹ or where there is no evidence let in on either side of any

- 6b (1929) A I R 1929 Lah 34 (36) 111 Ind Cas 533, *Nand Lal v. Lahri*
 (1922) A I R 1922 Cal 557 (565) 67 Ind Cas 673, *Rakhachandra v. Durga Das*
 (1926) A I R 1926 Lah 393 (393) 91 Ind Cas 1049, *Bahadur v. Saghar*
 9. (1873) 20 Suth W R (P C) 25 (30) 14 Moo Ind App 203 9 Beng L R 460
 2 Suther 479 2 Sur 731 (P C)
 10. (1906) 16 Mad L Jour 272 (273) 10 Cal W N 630 1 Mad L Tim 135 3 All L Jour 863 8 Bom L R 400 (P C).
 11. (1922) A I R 1922 Bom 243 (244) 66 Ind Cas 764 46 Bom 920, *Muhamad Sahib Ibrahim Sahib v. Tilokchand Abheerchand* (Open sites)
 (1925) A I R 1925 Bom 477 (478) 89 Ind Cas 894, *Uluappa Basawanappa v. Gadigewa Hugar*.
 (1905) 12 Cal W N 273 (277, 279) 3 Mad L Tim 212 7 Cal L Jour 414, *Mirza Shamsheer Bahadur v. Munshi Kunj Behari Lal*
 (1917) A I R 1917 Cal 602 (604) 38 Ind Cas 547, *Promotha Nath Roy v. Kishore Lal Shah* (Vacant land)
 (1916) A I R 1916 Lah 133 (133) 35 Ind Cas 120, *Cham Sukh v. Gopi Ram*
 (1917) A I R 1917 Lah 201 (204) 39 Ind Cas 971, *Moolchand v. Amarnath*
 (1926) A I R 1926 Lah 615 (616) 97 Ind Cas 705, *Rutha v. Nur Muhammad*
 (1928) A I R 1928 Lah 896 (993) 115 Ind Cas 534, *Ghulam Mohammad v. Fateh Khan* (Vacant land)
 (1929) A I R 1929 Lah 34 (35) 111 Ind Cas 533, *Nand Lal v. Lahri*
 (1929) A I R 1929 Lah 669 (670) 127 Ind Cas 11, *Bhalla Singh v. Jagat Singh*
 (1930) A I R 1930 Lah 76 (77) 120 Ind Cas 531, *Mahomed Sadiq v. Allah Baksh*
 (1936) A I R 1936 Lah 203 (209) 162 Ind Cas 330 17 Lah 440, *Shahbaz Khan v. Danne Khan* (The mere fact that a trespasser has taken possession of a portion of a vacant site cannot affect the constructive possession of the real owner on the portion not trespassed upon)

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- (1925) 49 Mad L Jour 75 (75) (N R C)
- (1924) A I R 1924 Mad 676 (676) : 79 Ind Cas 1011, *Srinivasachariar v. Raghatachariar*.
- (1927) A I R 1927 Mad 503 (510) : 101 Ind Cas 818, *Venkatasomayajulu v. Suryanarayana*.
- (1931) A I R 1931 Mad 282 (283) : 130 Ind Cas 845, *Seiugan Chetty v. Kannappa Chetty*. (A I R 1922 Cal 557, Followed.)
- (1933) A I R 1933 Mad 871 (872) : 147 Ind Cas 680, *Suranna v. Subbarayadu*. (Vacant land)
- (1938) A I R 1938 Mad 451 (455) : 178 Ind Cas 301, *Atchayya v. Jalaluddin*. (Do)
- (1919) A I R 1919 Oudh 199 (200) : 53 Ind Cas 683, *Paddu v. Mahabur Prasad*
- (1927) A I R 1927 Oudh 209 (209) : 101 Ind Cas 714, *Sadiq Husain v. Mir Etisad Husain* (Abadi land.)
- (1927) A I R 1927 Oudh 551 (551) : 102 Ind Cas 207, *Imdad Husain v. Mt. Haidari Khanam*. (Vacant land.)
- (1924) A I R 1924 Pat 629 (632, 633) : 3 Pat 253 : 81 Ind Cas 669, *Ramnath v. Govardhan*. (Gora land.)
- (1929) A I R 1929 Pat 529 (529) : 122 Ind Cas 816, *Gopal Sahu v. Ghanashyam Das*. (Parti land.)
- (1911) 10 Ind Cas 876 (880) (Cal), *Pria Nath v. Mahendra Kumar*.
- (1912) 16 Ind Cas 39 (40) (Cal), *Shideeswar Dasya v. Shashi Bhushan Chaudhri*.
- (1924) 79 Ind Cas 692 (693) (Lah), *Abdullah v. Girdhari*.
- (1907) 1907 Pun Re No. 53 (page 228) : 1907 Pun L R No. 39 : 1907 Pun W R No. 120, *Shahabai Shah v. Ganesh Das* (Failure to cultivate unculturable land does not constitute abandonment)
- (1911) 11 Ind Cas 542 (543) (P C), *Jagadindranath v. Hemantha Kumari Devi*.
- (1867) 8 Suth W R 422 (423), *Mahomed Ali v. Shurum Ali*. (The fact that the land was lying waste does not of itself show that no one was in possession)
- (1869) 11 Suth W R 607 (608), *Mahomed Ali v. Saheem Baksh*.
- (1871) 16 Suth " " *Basheeroonissa*.
- (1875) 23 Suth " " *ha Pershad Singh*.
- (1875) 24 Suth " " *v. Dissambhur Roy Choudhry*.
- (1917) A I R 1917 Lah 391 (394) : 42 Ind Cas 412, *Fatfeh Khan v. Bisalhi Ram*.
- (1916) A I R 1916 Nag 90 (92) : 13 Nag L R 25 : 39 Ind Cas 54, *Radhakadas v. Harmohan Lal*. (Occasional stacking of grass, or tethering of animals on waste land does not amount to adverse possession)
- (1917) A I R 1917 Oudh 20 (23) : 41 Ind Cas 80, *Ratipal v. Bipin Chandra*.
- (1920) A I R 1920 Oudh 489 (491) : 118 Ind Cas 431, *Chatterpal Singh v. Raghubir Singh*.
- (1900) 4 Ind Cas 244 (246) : 33 Bom 712, *Ganapati v. Raghunath*.
- (1895) 1 Cal W N 199 (199) (S N), *Probhakar Tikari v. Raja Baidhya Nath Pundit*.
- (1897) 21 Cal 256 (257, 258) : 1 Cal W N 304, *Mohini Mohan v. Promoda Nath*.
- (1925) A I R 1925 Cal 981 (983) : 85 Ind Cas 594, *Abhoy Sanhar v. Satyendra Prasanna*.
- (1927) A I R 1927 Cal 49 (50) : 98 Ind Cas 849, *Nanda Kumar v. Emdad Ali*.
- (1929) A I R 1929 Cal 104 (105) : 107 Ind Cas 95, *Mohesh Chandra v. Hemendra Nath*.
- (1884) 1884 Pun Re No. 49, *Muhammad Yar v. Ghulam*.
- (1901) 1901 Pun Re No. 105, *Ramzan Ali v. Dashedat Ali*. (The onus is in such a case shifted on to defendant to prove when his possession became adverse)
- (1914) A I R 1914 Lah 414 (415) : 25 Ind Cas 82, *Mt. Narain Dets v. Billa*.
- (1923) A I R 1923 Lah 25 (26) : 69 Ind Cas 4, *Mansa v. Khusali Ram*.

acts of ownership,^{11a} or where there is no plea that the owner was

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- (1927) A I R 1927 Lah 230 (230) : 100 Ind Cas 51, *Ganga Ram v. Hasan Shah*.
- (1927) A I R 1927 Lah 664 (664) : 103 Ind Cas 678, *Jivan Singh v. Karam Din*.
- (1928) A I R 1928 Lah 306 (307) : 110 Ind Cas 857, *Nur Muhammad v. Qaim*.
- (1930) A I R 1930 Lah 803 (303) : 120 Ind Cas 792, *Mangal Singh v. Ali Sher*.
- (1934) A I R 1934 Lah 529 (530) : 148 Ind Cas 820, *Aya Singh v. Latif*.
- (1935) A I R 1935 Lah 507 (508) : 157 Ind Cas 899, *Kaur Sam v. Ghulab*.
- (1916) A I R 1916 Mad 1025 (1025) : 30 Ind Cas 191, *Murugappa Mudaly v. Jagannath Rayaniam Garu*.
- (1934) A I R 1934 Mad 183 (184) : 140 Ind Cas 455, *Palaniappa Chetty v. Raman Chetty*.
- (1905) 8 Oudh Cas 177 (182), *Sheo Narain Singh v. Bodai Singh*.
- (1920) A I R 1920 Oudh 215 (216) : 57 Ind Cas 538, *Dan Bahadur Singh v. Pirthipal Singh*. (In the case of uncultivated lands such as tank lands surrounded by scattered trees of spontaneous growth, the presumption is that possession follows title.)
- (1926) A I R 1926 Oudh 393 (394) : 1 Luck 469 : 94 Ind Cas 1034, *Hulas v. Barlatunnissa*.
- (1926) A I R 1926 Oudh 444 (446) : 95 Ind Cas 27 : 2 Luck 239, *Parhasdas v. Janak Ballabha Saran*.
- (1929) A I R 1929 Oudh 328 (330) : 114 Ind Cas 815, *Jagatjit Singh v. Md. Asgar Ali*.
- (1921) A I R 1921 Pat 158 (160) : 58 Ind Cas 774 : 5 Pat L Jour 724, *Inder Lall v. Ram Surat Kuar*.
- (1921) A I R 1921 Pat 277 (278) : 61 Ind Cas 78, *Bahadur Ali Khan v. Secretary of State*.
- (1924) A I R 1924 Pat 629 (630, 633) : 3 Pat 258 : 81 Ind Cas 669, *Ramnath Sarangi v. Gobardhan Panday*.
- (1937) A I R 1937 Pat 422 (423) : 170 Ind Cas 385, *Chandra Mohan Singh v. Butu Mian*.
- (1917) A I R 1917 Low Bur 145 (147, 148) : 8 Low Bur Rul 372 : 36 Ind Cas 249, *Asha Bibi v. Sulaiman Ismail Atcha*.
- (1909) 1 Ind Cas 252 (253) (Cal), *Narain Chandra Singh v. Basant Kumari Das*.
- (1912) 16 Ind Cas 623 (624) (Cal), *Bhagwan Chandra Dey v. Dayal Hari Das*.
- (1914) A I R 1914 Lah 133 (135) : 21 Ind Cas 972 (974), *Pirthi v. Ratti Ram*. (In the case of Banjar, i.e. waste land, mere paper possession by means of decree and execution is sufficient possession.)
- (1927) 106 Ind Cas 180 (181) (Lab), *Smail v. Gajjan*. (In a case of fallow land, possession must be taken to follow title for the purpose of adverse possession.)
- (1930) 126 Ind Cas 129 (130, 131) (Cal), *Alabakshi Bhuyan v. Bir Bikram Kishore Manikya*.
- (1920) A I R 1920 Pat 705 (707) : 56 Ind Cas 344, *Brahmanand Singh v. Dundbahadur Singh*.
- (1934) A I R 1938 Oudh 214 (216) : 177 Ind Cas 52, *Manzur Ali Khan v. Peteshwar Prasad Singh*.
- (1928) A I R 1928 Cal 118 (121, 122) : 105 Ind Cas 869, *Gopal Chandra v. Menmohini Dasi*.
- (1938) A I R 1938 Mad 454 (455) : 178 Ind Cas 301, *Atchayya Patrudu v. Jalaluddin Sahib*.
- 11a (1934) A I R 1934 Bom 207 (210) : 58 Bom 397 & 406 : 149 Ind Cas 882 & 885 (F B), *Krishnaji Shrinivas v. Madhusa Appanna*.
- (1919) A I R 1919 Pat 207 (209) : 51 Ind Cas 801 : 4 Pat L Jour 463, *Bhikhad Bhunjan v. Upendra Nath*.

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not in possession,^{11b} or where the evidence is equally strong on both sides,¹² the presumption may properly be drawn in favour of the person having the title. But where the owner alleges definite acts of ownership and fails to prove them,¹³ or where all the circumstances are such as to render it natural for an owner in possession of land to exercise manifest acts of enjoyment thereof during a given period and he fails to prove such facts,¹⁴ or where the evidence let in by the person having the title is totally false and unreliable,¹⁵ the Court is not bound to draw the presumption that possession follows title

It has, however, been held in some cases¹⁶ that the presumption can be drawn *only* when the evidence is *strong* on both sides and not when it is *equally unworthy of credit*. It is submitted that the decision in *Ranjit Ram Pandey's case*,⁹ referred to above, which is generally relied on in support of the above view, does not really support that view. In the undermentioned cases^{16a} the presumption

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- (1888) 15 Cal 353 (356), *Syam Lal Sahu v. Luchmun Chowdhry*.
 11b (1926) A I R 1926 Nag 197 (199) : 90 Ind Cas 196, *Daulat v. Ramappa*.
 12. (1923) A I R 1923 Cal 228 (233) : 70 Ind Cas 555, *Promode Kumar Roy v. Madan Mohan Saha*.
 13. (1880) 5 Cal L R 481 (483), *Ram Bhandhu v. Kusu Bhattu*.
 (1923) A I R 1923 Cal 286 (287) : 66 Ind Cas 914, *Ram Ratan Mandal v. Nilmoni Choudhry*.
 (1922) A I R 1922 Cal 557 (566) : 67 Ind Cas 673, *Rakhhal Chandra Ghose v. Durgadas Samantha*.
 (1928) A I R 1928 Cal 765 (767) : 117 Ind Cas 606, *Harbut Ray Chamarra & Co. v. Ujir Shaukh*.
 (1922) A I R 1922 Cal 224 (225) : 67 Ind Cas 1005, *Behari Lal v. Nrityananda*. (Both parties alleging definite acts of ownership—Presumption that possession follows title inapplicable—The case must be decided on evidence of possession)
 14. (1926) A I R 1926 Oudh 528 (529) : 96 Ind Cas 225, *Siddh Nath v. Bajor Singh*.
 15. (1899) 26 Cal 114 (118), *Dishun Churn Roy v. Jogendra Nath Roy*.
 (1921) A I R 1921 Pat 237 (239, 243) : 62 Ind Cas 1 : 6 Pat Jour 478 (F B), *Shiva Prasad Singh v. Hira Singh*.
 (1922) A I R 1922 Cal 557 (565) : 67 Ind Cas 673, *Rakhhal Chandra Ghose v. Durgadas Samantha*.
 (1931) A I R 1931 Mad 282 (283) : 180 Ind Cas 845, *Sevugan v. Kannappa*.
 (1933) 146 Ind Cas 448 (449) (Pat), *Guhri Ram v. Adalat Mahala*.
 16. (1922) A I R 1922 Cal 557 (566) : 67 Ind Cas 673, *Rakhhal Chandra Ghose v. Durgadas Samantha*.
 ...
 (1916) A I R 1916 Pat 309 (310) : 35 Ind Cas 554 : 1 Pat L Jour 146, *Fakira Lal Sahu v. Ram Charan Lal*. (Except in cases of waste or jungle land or land under water)
 16a (1931) A I R 1931 Mad 614 (646) : 54 Mad 622 : 133 Ind Cas 9, *Ramanathan v. Lakshmanan*
 (1927) A I R 1927 Mad 509 (510) : 101 Ind Cas 818, *Venkata Somayajulu v. Suryanarayana*.
 (1928) A I R 1928 Cal 765 (766, 767) : 117 Ind Cas 606, *Harbut Ray Chamarra & Co. v. Ujir Shaukh*. (Where evidence of possession on either side is not satisfactory or not quite satisfactory, the party who has succeeded in proving his title is entitled to rely upon the presumption that possession follows title)

was applied even in cases where the evidence was unsatisfactory on both sides.

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It has also been held in some cases¹⁷ that the presumption can be drawn *only* in respect of *waste and jungle* lands and not in respect of property which is capable of use and enjoyment, in some cases that the presumption should not be applied where the plaintiff has to prove his possession at a *particular time*,¹⁸ and in some cases¹⁹ that the presumption cannot be applied where no evidence is let in on either side. It is submitted that none of these views, in so far as they restrict the power of the Court under Section 114 of the Evidence Act to exercise its discretion, by confining it to particular

- (1908) 12 Cal W N 273 (280) 3 Mad L Tim 212 7 Cal L Jour 414, *Mirza Shamsher Bahadur v. Munshi Kunj Behari*
- (1919) A I R 1919 Pat 207 (209) 51 Ind Cas 801 4 Pat L Jour 463, *Bhikad Bhunjan Narain Tewari v. Upendra Nath*.
- (1922) A I R 1922 Pat 432 (434) 67 Ind Cas 631 2 Pat 1, *Tian Sahu v. Mulchand Sahu*.
- (1910) 6 Ind Cas 392 (397) (Cal), *Nauab Bahadur of Murshidabad v. Gopinath Mandal*
- (1885) 12 Cal 39 (41), *Dharm Singh v. Hurr Pershad Singh*
- 17 (1878) 3 Cal 768 (770) 2 Cal L R 364, *Mohima Chunder Dey Sircar v. Hurro Lal Sircar*
- (1918) A I R 1918 Cal 544 (545) 41 Ind Cas 456, *Baroda Prasad v. Manmatha Nath*.
- (1922) A I R 1922 Cal 557 (566) 67 Ind Cas 673, *Rakhal Chandra Ghose v. Durgadas Samantha*
- (1928) A I R 1928 Cal 765 (766) 117 Ind Cas 606, *Harbut Ray Chamarua & Co v. Ujir Sheikh*
- (1921) A I R 1921 Lah 202 (203) 59 Ind Cas 891, *Mahmud v. Ude Bhan*
- (1924) A I R 1924 Lah 276 (277) 69 Ind Cas 427, *Sampat Ram v. Ganga Datt* ('Possession goes with title' applies where land is actually vacant—Otherwise presumption exists in favour of person in actual possession)
- (1926) A I R 1926 Lah 383 (383) 91 Ind Cas 1048, *Bahadur v. Saghar*
- (1937) A I R 1937 Nag 129 (130) 1 L R 1937 Nag 254 171 Ind Cas 271, *Shankersa v. Punamchand*
- (1917) A I R 1917 Oudh 20 (23) 41 Ind Cas 80, *Ratipal Bipin v. Bipin Chandra Chatterji*
- 18 (1915) A I R 1915 Cal 675 (677) 26 Ind Cas 436, *Kalihanand v. Bipin Das*, (Purporting to follow 16 Ind App 23—That decision does not give rise to any such view)
19. (1904) 9 Cal W N 111 (116), *Madhab Sundari Dassya v. Gaganendra Nath Tagore*
- (1925) A I R 1925 Cal 1230 (1232) 68 Ind Cas 567, *Panchanan Sarkar v. Basanta Kumar*
- (1916) A I R 1916 Pat 309 (309, 310) 35 Ind Cas 554 1 Pat L Jour 146, *Fakira Lal v. Ram Charan*
- (1921) A I R 1921 Pat 237 (239, 243) 62 Ind Cas 1 6 Pat L Jour 478 (F B), *Shri Prasad Singh v. Hira Singh*
- (1933) 146 Ind Cas 448 (449) (Pat), *Guhri Ram Singh v. Adalat Mahto*, (Following A I R 1921 Pat 237)
- (1922) A I R 1922 Pat 432 (435) 2 Pat 1 67 Ind Cas 631, *Tian Sahu v. Mulchand Sahu*

Arts. 142 & 144 lands or to particular circumstances, can be accepted as correct on
Notes 15-16 principle.²⁰

The doctrine that possession follows title has, in some cases, to be applied as a *matter of law* and not as a matter merely of *discretion* under Section 114 of the Evidence Act. Thus, where land is *submerged under water*, and is thus incapable of being possessed by either party, the law will regard the owner as in possession.²¹ The Court is bound to draw this presumption in such cases. In *Bhupendra v. Rajeswar*,²² the Privy Council observed :

"The doctrine that possession follows title is well established. So, while lands are submerged, constructive possession is with the true owner and that, though the physical possession immediately prior to the deluviation has been with the adverse claimant."

In *Satish Chandra Joardar v. Birendra Nath*,²³ where the question was as to who was in possession of submerged land to which plaintiff had proved title, the Privy Council observed :

"It was unnecessary for the plaintiffs to prove 'actual possession' in the sense of occupation after the submergence, as their possession in law continued until they were dispossessed."

Waste and uncultivated land cannot be regarded as land *incapable* of being enjoyed in the sense in which submerged land can be said to be incapable of being enjoyed.²⁴ As has been seen already, the Court is not *bound* to draw the presumption in such cases, though the Court will, under Section 114 of the Evidence Act, draw the presumption having regard to the nature of the land.

16. Adverse possession, what is.—The expression "adverse possession" means a *hostile* possession, that is a possession which is expressly or impliedly in *denial of the title* of the true owner. In *Ejas Ali v. Special Manager, Court of Wards*,¹ their Lordships of the Privy Council observed :

"The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and

20. (1931) A I R 1931 Cal 501 (502). 181 Ind Cas 319, *Jira Dewa v. Uma Charan Saha*. (Principle not confined to particular land)
 See also cases cited in Foot-Note (11a).

21. (1915) A I R 1915 Oudh 201 (205) 18 Oudh Cas 43 : 28 Ind Cas 855, *Brijraj Singh v. Ganga Bahsh Singh*.

(1921) A I R 1921 Pat 234 (235) : 57 Ind Cas 744, *Gajadhar Prasad v. Mst. Dulhan Gulab Kuer*.

(1920) A I R 1920 Pat 705 (707) : 56 Ind Cas 344, *Brahmanand Singh v. Dandabhadur Singh*.

22 (1931) A I R 1931 P C 162 (164) 58 Ind App 228 59 Cal 80 : 132 Ind Cas 610 (P C)

23. (1933) A I R 1933 P C 53 (56) : 154 Ind Cas 27 (P C).

24.

unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

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In *Arunachalam v. Venkatachalpathy*,² their Lordships of the Privy Council held that the possession of the defendant was adverse to the plaintiff, inasmuch as the plaintiff had stood by while the defendant continued to possess "in practical contravention of the plaintiff's alleged rights." Dr Markby in his *Elements of Law*³ observes that possession to be adverse must be possession "*by a person who does not acknowledge the other's rights but denies them.*"

The principle that in order to constitute adverse possession the possession must be in *denial of the title* of the true owner, has been recognised in numerous decisions,⁴ though expressed in different ways. Thus, it has been held that in order to constitute adverse possession the acts of the person in possession should be irreconcilable with the rights of the true owner,⁵ that the person in possession must claim to be so as of right as against the true owner,⁶ that

2. (1919) A I R 1919 P C 62 (68). 43 Mad 253 46 Ind App 204. 53 Ind Cas 245 (P C)

3. *Markby's Elements of Law*, 2nd Edition, Chapter 10.

4. (1914) A I R 1914 All 547 (550). 27 Ind Cas 35, *Asad Ali v. Anand Sarup*. (1907) 29 All 133 (136). 1906 All W N 805 3 All L Jour 760, *Bhadder v. Khair-ud-din Hussain*.

(1937) 167 Ind Cas 801 (801) (Nag), *Ramaji Gujar v. Kunwarjee Gujar*.

(1927) A I R 1927 Oudh 141 (142). 1 Luck 441 29 Oudh Cas 395. 98 Ind Cas 704, *Barjor Singh v. Sidh Nath*.

(1929) A I R 1929 Oudh 433 (434). 5 Luck 980 122 Ind Cas 332, *Sat Narain Misir v. Deputy Commissioner, Ajodhya Estate*.

(1905) 5 Cal L Jour 62 (63), *Chaitan Singh v. Sadhari Motim*.

(1881) 1831 All W N 143 (143), *Gharam v. Gopal Singh*.

(1896) 20 Mad 6 (8), *Srinivasaragava Iyengar v. Muthusami Padayachi*.

(1931) A I R 1931 Pat 64 (65). 160 Ind Cas 896, *Dajyath Mandar v. Ram Adhin Ray*.

(1937) A I R 1937 Rang 180 (183). 171 Ind Cas 643, *Bashir Ahmed v. Maatschappij*.

(1917) 39 Ind Cas 520 (521) (All), *Bhagwandin v. Shankar Prasad*.

(1933) A I R 1933 Cal 414 (415). 60 Cal 404 144 Ind Cas 177, *Nutbihari Das v. Bishweshwar Debee*.

(1938) A I R 1938 Lah 440 (411), *Jesha Ram v. Poonan Bhagat*.

(1926) A I R 1926 Oudh 393 (391, 395). 1 Luck 469 94 Ind Cas 1034, *Hulas v. Barkatunnissa Begam*.

(1919) A I R 1919 Lah 156 (157). 51 Ind Cas 575, *Mt Gulab Devi v. Monji Ram*.

(1928) A I R 1928 Oudh 18 (19). 104 Ind Cas 760, *Sukdei v. Prag Dutt*.

(1922) A I R 1922 Lah 82 (83). 68 Ind Cas 263, *Chandan v. Bahadur*.

(1931) A I R 1931 Lah 318 (314). 134 Ind Cas 493, *Mahomed Ali v. Mahomed Khan* (Person claiming lien over property and willing to give up possession on payment of the charge is not in adverse possession).

5 (1938) A I R 1938 Mad 454 (455). 178 Ind Cas 301, *Atchayya Patrudu v. Jalaluddin*.

6. (1933) A I R 1933 Cal 544 (546). 142 Ind Cas 582, *Kais Ram v. Dulal Ram*.

(1918) A I R 1918 Lah 308 (308). 46 Ind Cas 964, *Alla Dad v. Fazal Dad*.

(1901) 1901 Pun Re No 43, *Bazkhan v. Sultan Mallick*.

(1916) A I R 1916 Oudh 296 (299). 19 Oudh Cas 1 34 Ind Cas 277, *Mf, Ganesh v. Nageshar Bahshi Singh*.

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adverse possession is possession which is wrongful,⁷ that the possession must be by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession,⁸ and that the possession of the wrongdoer must be *exclusive*.^{8a} A contrary view namely that the possession of a person may be adverse to another even though he may *admit* the title of that other, has been held in the under-mentioned case.⁹ It is submitted that this view cannot be accepted as correct.

It follows from the above that a possession on the part of *A* consistent and reconcilable with the title of *B* cannot be adverse to *B*.¹⁰ Where the owner is not prevented from using the property in the way in which it is intended to be used, there can be no adverse

- (1933) A I R 1933 Oudh 462 (462, 463) : 146 Ind Cas 987, *Ramshankar v. Sheo Dutt*
 (1930) A I R 1930 Lah 991 (992) 11 Lah 410 : 123 Ind Cas 278, *Ghulam Murtaza v. Nagma*.
 7. (1903) 27 Bom 408 (412) 5 Bom L R 269, *Kondiba v. Nana*.
 (1936) 163 Ind Cas 347 (349) (Cal), *Saraftuddin Nur Ahamd v. Jabanessa Khatoon*.
 8. (1878) 4 Cal 327 (329) . 2 Shome L R 106, *Bejoy Chunder v. Kali Prosanna*. (Per Markby, J.)
 (1878) 4 Cal 455 (463) . 3 Cal L R 355 : 2 Shome L R 153, *Kherodemoney Dossee v. Durgamoney Dossee*.
 (1921) A I R 1921 Bom 38 (39) 45 Bom 1001 : 61 Ind Cas 594, *Vishnu Bhikaji v. Babla Lacha*.
 (1903) 27 Bom 43 (51) 4 Bom L R 721, *Taru Bai v. Venkattrao*
 (1886) 9 Mad 244 (246) 10 Ind Jur 61, *Madhava v. Narayana*.
 (1939) A I R 1939 Bom 1 (17) : 179 Ind Cas 178, *Narayan Jiraji v. Gurnathagouda*.
 8a (1932) A I R 1932 Oudh 46 (48) : 7 Luck 250 : 137 Ind Cas 678, *Suraj Bali v. Mahadeo Prasad*
 (1937) A I R 1937 Sind 78 (79) : 157 Ind Cas 283, *Mt. Sita Bai v. Jumo*
 (1919) A I R 1919 Cal 240 (241) : 50 Ind Cas 45, *Tarachand v. Secretary of State*.
 (1938) A I R 1938 Mad 454 (455) : 178 Ind Cas 301, *Atchayya Patrudu v. Jalaluddin*.
 9. (1933) A I R 1933 Cal 414 (415) . 60 Cal 404 . 144 Ind Cas 177, *Nutbihari Das v. Bisneswari Debee*.
 10 See Note 2 ante.
 (1843) 8 Hare 26 (33, 34) : 61 R R 193 . 67 E R 293, *Lewis v. Thomas* (Defendants claiming under the title of the plaintiff and thus acknowledging plaintiff's title cannot be in adverse possession.)
 (1923) A I R 1923 All 399 (400) . 71 Ind Cas 265, *Lakhu v. Lal Singh*.
 (1926) A I R 1926 Oudh 193 (193) : 91 Ind Cas 97, *Abdullah Khan v. Amir Hyder Khan*
 (1932) A I R 1932 Oudh 46 (48) : 137 Ind Cas 678 : 7 Luck 250, *Suraj Bali v. Mahadeo Prasad* (Every occupier of a house is liable to pay water and house taxes. The payment of these by person pleading adverse possession is not irreconcilable with the plaintiff's ownership of property in a suit for possession)
 (1871) *id Thalur*.
 *ry of State v. dinary rights of be adverse)*
 (1938) A I R 1938 Cal 117 (119) . 176 Ind Cas 706, *Berojullah Sarkar v. Ayatullah Akand*. (Mere fact that *A* is allowed to be in joint possession with *B* of latter's property is not enough to show that *A*'s possession is adverse to *B*.)

possession, for there is in such a case no hostility to or denial of the title of the true owner. Thus, where *A* claimed to have been in adverse possession of certain drains vested in a municipality, but it was found that the municipality was not in any way prevented by the acts of *A* from enjoying the drains as drains, it was held that *A*'s acts did not constitute adverse possession.¹¹ A mere squatter or intruder who does not deny the title of the true owner and does not set up any claim of right in himself cannot claim to be in adverse possession.¹²

In deciding whether the alleged acts of a person constitute adverse possession or not, regard must be had to the *animus* of the person doing those acts, and this must be ascertained from the facts and circumstances of each case.¹³

Where the acts alleged do not constitute effective possession at all of the interest claimed, they would obviously not constitute adverse possession¹⁴ and the position will not be improved by the denial of the title of the owner,¹⁵ especially when the owner has no knowledge of such assertion.¹⁶ *A*, a zamindar, made a mortgage of his property to *C* on 11th January 1865. Subsequently he granted a *patni* lease thereof to *B* on the 6th of September 1865. On the 21st of February 1867 *A*'s interest was brought to sale by the Sheriff of Calcutta and was knocked down to *B*, but the conveyance was executed in his favour on the 1st of April 1867. *C*, who had in the meanwhile purchased the property in execution of a decree obtained by him on his mortgage, sued *B* for *khas* possession of the property. It was held by the High Court of Calcutta that *B*'s possession as *patnidar*

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- 11 (1920) A I R 1020 Mad 103 (194) 55 Ind Cas 493, *Arunachala Chettiar v. Municipal Council Mayataram*
- 12 (1917) 39 Ind Cas 520 (521) (All), *Bhagwan Din v Shankar Prasad*
(1904) 9 Cal W N 111 (115), *Madhab Sundari Dassya v Gaganendra Nath*.
See also footnotes (5a) to (9) to note 11 ante.
- 13 (1923) A I R 1923 Mad 11 (12) 70 Ind Cas 653, *Rajambal Ammal v Shanmuga Mudaliar*
(1926) A I R 1926 Cal 568 (575, 576) 91 Ind Cas 235, *Ganga Prasad Chowdhry v Kuladananda Roy*
(1897) 21 Mad 53 (55), *Chochalinga v Muthusamy* (Where the defendant who was the brother of the plaintiff happened to be using as a back-yard a few square yards of vacant house site land, to which plaintiff had title, it was held there was nothing under the circumstances sufficient to constitute adverse possession by the defendant as against the plaintiff, especially because the parties were brothers and the land in question was situate between their houses)
14. (1928) A I R 1928 Cal 882 (884) 117 Ind Cas 693, *Sourindranath Basu v. Nirmalchandra Banerjee*
(1929) A I R 1929 Lah 625 (626) 114 Ind Cas 70, *Amrit Sarya Ram v Duan Chand*
(1916) A I R 1916 All 79 (81) 38 All 411 31 Ind Cas 171, *Kunwar Sen v. Darbars Lal*
[See also (1867) 2 Agra 6 (9), *Ramaisher Singh v. Sait azalim Singh.*]
- 15 (1900) 24 Bom 435 (443) 2 Bom L R 261, *Soorannana Detappa v. Secretary of State*.
(1912) 18 Ind Cas 467 (468) (Mad), *Veeranna v Chellammayya*.
16. (1912) 13 Ind Cas 467 (468) (Mad), *Veeranna v. Chellammayya*.

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could not be considered adverse to *C* who had a superior interest that *B*'s possession as *purchaser* could not be deemed to have commenced till the 1st of April 1867 and that the suit brought within twelve years thereof was within time.¹⁷

Knowledge on the part of the person claiming title by adverse possession that he had no title will not make his possession other than adverse. In *Bhavrao v. Bakhmin*,¹⁸ Sir Charles Farran, C. J., observed that "a person coming in under a title which he knows to be defective, or even a trespasser is not, by reason of his knowledge, deprived of the law of limitation." Nor, on the other hand, will the mere *consent* of the true owner affect the question, whether the possessor holds his possession in contravention of the right of the owner. In *Dwarkanath Chowdhury v. Shastri Kinkar Banerji*,¹⁹ Sir Lawrence Jenkins, C. J., observed as follows :

"The mere fact of consent does not prevent possession being adverse. The test is whether the person who sets up adverse possession is able to show that he held for himself, and if he did so, the mere fact that there was acquiescence on the part of the other persons concerned, can, in circumstances like the present, make no difference."

The mere fact that the possession of *A* is hostile to and in denial of the title of *B*, is however not sufficient to confer on *A* a title by adverse possession. In *Radhamoni Debi v. The Collector of Khulna*,²⁰ it was laid down by their Lordships of the Privy Council that in order to constitute adverse possession,

"the possession required must be adequate in continuity, in publicity and in extent to show that it is adverse to the competitor."

And this view has been re-affirmed in numerous cases.²¹

17. (1882) 8 Cal 79 (84) : 9 Cal L R 173 . 10 Cal L R 113, *Kasumunnissa Bibi v. Nilratna Bose*.

18. (1898) 23 Bom 187 (140) (F B).

19. (1913) 18 Ind Cas 869 (374) (Cal).

20. (1900) 27 Ind App 136 (140) . 27 Cal 943 . 4 Cal W N 597 : 2 Bom L R 592 : 7 Sar 714 (P C), *Radhamoni Debi v. Collector of Khulna*.

21. (1934) A I R 1934 P C 77 (61) : 147 Ind Cas 887 . 61 Ind App 50 : 56 All 111, (P C), *Mt. Allahrakhi v. Shah Mohammed Abdur Rahim*.

(1934) A I R 1934 P C 23 (25) : 147 Ind Cas 545 . 61 Ind App 78 : 61 Cal 262 (P C), *Secretary of State v. Debendra Lal Khan*

The principle is derived from the classical requirement that in order to give a title by adverse possession, the possession must be *ne ti nec clam nec precario*, that is, peaceful, open and continuous²²

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- (1934) A I R 1934 Cal 187 (192) : 151 Ind Cas 1076, *Secretary of State v. Dharendra Nath Roy*
 (1903) 31 Cal 337 (401), *Wali Ahmed Choudhry v. Tota Meah Chowdhry*
 (1910) 6 Ind Cas 392 (396) (Cal), *Nawab Bahadur of Murshidabad v. Gopinath Mandal*
 (1921) A I R 1921 Cal 577 (580) : 67 Ind Cas 170, *Jogendranath v. Jagadendra Nath*
 (1935) A I R 1935 Sind 193 (202) : 178 Ind Cas 690, *Arab Janglu v. Panjal Shah*.
 (1907) 35 Cal 961 (971) ; 12 Cal W N 127 . 6 Cal L Jour 735, *Jogendranath v. Baldeo Das*.
 (1910) 6 Ind Cas 359 (361) (Cal), *Baroda Prasad v. Annoda Mohan*.
 (1927) A I R 1927 Oudh 551 (551) 102 Ind Cas 207, *Imdad Hussam Khan v. Mt. Hydari Khanam*.
 (1919) A I R 1919 Cal 240 (241) . 50 Ind Cas 45, *Tarachand Roy v. Secretary of State*
 (1911) 10 Ind Cas 742 (743) (All), *Zakuran v. Rahim*.
 (1921) A I R 1921 Sind 177 (180) 16 Sind L R 25 80 Ind Cas 118, *Mt. Bhagbhari v. Mt. Khatun*.
 (1930) A I R 1930 Oudh 46 (48) 5 Luck 410 121 Ind Cas 84, *Mahabir Singh v. Chitta Singh*.
 (1921) A I R 1921 Cal 277 (282) 66 Ind Cas 923, *Maharajah of Cooh Behar v. Mahendra Ranjan Roy*.
 (1921) A I R 1921 Cal 687 (695) 65 Ind Cas 866, *Secretary of State v. Wazed Ali*.
 (1902) 26 Bom 410 (416, 417) . 4 Bom L R 28, *Vithaldas v. Secretary of State*.
 (1901) 25 Bom 362 (366) 3 Bom L R 47, *Jagjitan Das v. Bai Amba*.
 (1920) A I R 1920 Cal 202 (204). 56 Ind Cas 811, *Manulla Kolu v. Prasanna Kumar Sarkar*.
 (1913) 18 Ind Cas 869 (870) (Cal), *Duarlanath Choudhry v. Sasti Kinkar Banerjee*
 (1925) A I R 1925 Cal 1253 (1255) 86 Ind Cas 767, *Bejoy Chand Mahatab v. Sarathkumar Roy*
 (1925) A I R 1925 Cal 981 (983) 85 Ind Cas 594, *Abhoy Shankar Mazumdar v. Satyendra Prasanna Bose*.
 (1925) A I R 1925 Cal 316 (318) . 82 Ind Cas 318, *Harisadhan Patari v. Dinanath Banerjee*
 (1934) A I R 1934 Pat 485 (489) 154 Ind Cas 1032, *Tharichhna Kuari v. Ramyad Kuari*.
 (1928) A I R 1928 Bom 287 (288) 110 Ind Cas 303, *Keshav Raghunath v. Gound Chimnaji*
 (1935) A I R 1935 Cal 760 (761) 159 Ind Cas 752, *Bhabani Prosanna v. Manindra Chandra*
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 v.
Subadar.
 (1918) A I R 1918 Nag 171 (173) 47 Ind Cas 892, *Prahlad Singh v. Abdul Aziz Khan*
 (1917) A I R 1917 Cal 469 (479) 36 Ind Cas 890, *Ramchandra Sil v. Raman Mani Dasi*
 (1935) 163 Ind Cas 897 (903) 62 Cal L Jour 177 (188) 63 Cal 300, *Surendra Kumar Roy v. Ahmad Nawab Choudhry*.
 (1923) A I R 1923 Cal 82 (85) : 77 Ind Cas 564, *Jobeda Khatun v. Tulshicharan Das*.
 22. (1934) A I R 1934 P C 23 (25) 147 Ind Cas 545 61 Ind App 78 . 61 Cal 262 (P C), *Secretary of State v. Delendratil Khan*.

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could not be considered adverse to *C* who had a superior interest that *B*'s possession as *purchaser* could not be deemed to have commenced till the 1st of April 1867 and that the suit brought within twelve years thereof was within time.¹⁷

Knowledge on the part of the person claiming title by adverse possession that he had no title will not make his possession other than adverse. In *Bhavrao v. Rakhmin*,¹⁸ Sir Charles Farran, C. J., observed that "a person coming in under a title which he knows to be defective, or even a trespasser is not, by reason of his knowledge, deprived of the law of limitation." Nor, on the other hand, will the mere *consent* of the true owner affect the question, whether the possessor holds his possession in contravention of the right of the owner. In *Dwarkanath Chowdhury v. Shastri Kinkar Banerji*,¹⁹ Sir Lawrence Jenkins, C. J., observed as follows :

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18 (1898) 23 Bom 137 (140) (F B).

19. (1918) 18 Ind Cas 869 (874) (Cal).

20. (1900) 27 Ind App 136 (140) : 27 Cal 943 : 4 Cal W N 597 . 2 Bom L R 592 : 7 Sar 714 (P C), *Radhamoni Debi v. Collector of Khulna*.

21. (1934) A I R 1934 P C 77 (81) : 147 Ind Cas 887 : 61 Ind App 50 : 56 All 111, (P C), *Mt. Allahrakhi v. Shah Mohammed Abdur Rahim*.

(1934) A I R 1934 P C 23 (25) : 147 Ind Cas 515 . 61 Ind App 78 : 61 Cal 262 (P C), *Secretary of State v. Debendra Lal Khan*.

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(1937) A I R 1937 All 429 (431) . 169 Ind Cas 962, *Ram Chandra v. Asa Ram*. (To acquire title by adverse possession, it must be open, exclusive and continuous for twelve years)

(1927) A I R 1927 Oudh 141 (142) . 29 Oudh Cas 395 : 93 Ind Cas 704 : 1 Luck 411, *Darjor Singh v. Sudh Nath*.

The principle is derived from the classical requirement that in order to give a title by adverse possession, the possession must be *nec vi nec clam nec precario*, that is, peaceful, open and continuous.²²

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- (1934) A I R 1934 Cal 187 (192) : 151 Ind Cas 1076, *Secretary of State v. Dharendra Nath Roy*
 (1903) 31 Cal 397 (401), *Wali Ahmed Choudhry v. Tota Meah Choudhry*.
 (1910) 6 Ind Cas 392 (396) (Cal), *Nauab Bahadur of Murshidabad v. Gopinath Mandal*
 (1921) A I R 1921 Cal 577 (580) 67 Ind Cas 170, *Jogendranath v. Jagadendra Nath*.
 (1938) A I R 1938 Sind 193 (202) 178 Ind Cas 690, *Arab Janglu v. Panjal Shah*.
 (1907) 35 Cal 961 (971) ; 12 Cal W N 127 . 6 Cal L Jour 735, *Jogendranath v. Baldeo Das*
 (1910) 6 Ind Cas 359 (361) (Cal), *Baroda Prasad v. Annoda Mohan*
 (1927) A I R 1927 Oudh 551 (551) . 102 Ind Cas 207, *Imdad Hussain Khan v. Mt. Hydari Khanam*.
 (1919) A I R 1919 Cal 240 (241) . 50 Ind Cas 45, *Tarachand Roy v. Secretary of State*
 (1911) 10 Ind Cas 742 (743) (All), *Zakuran v. Rahim*.
 (1921) A I R 1921 Sind 177 (180) . 16 Sind L R 25 . 80 Ind Cas 118, *Mt. Bhagbhari v. Mt. Khatun*.
 (1930) A I R 1930 Oudh 46 (48) 5 Luck 410 : 121 Ind Cas 81, *Mahabir Singh v. Chitta Singh*
 (1921) A I R 1921 Cal 277 (282) 66 Ind Cas 923, *Maharajah of Cooch Behar v. Mahendra Ranjan Roy*.
 (1921) A I R 1921 Cal 637 (695) . 65 Ind Cas 866, *Secretary of State v. Wazed Ali*.
 (1902) 26 Bom 410 (416, 417) . 4 Bom L R 23, *Vithaldas v. Secretary of State*
 (1901) 25 Bom 362 (366) 3 Bom L R 47, *Jagjitran Das v. Bai Amba*.
 (1920) A I R 1920 Cal 202 (204) 56 Ind Cas 811, *Manulla Kolu v. Prasanna Kumar Sarkar*.
 (1913) 18 Ind Cas 869 (870) (Cal), *Duarkhanath Choudhry v. Sasti Kumar Banerjee*
 (1925) A I R 1925 Cal 1253 (1255) 86 Ind Cas 767, *Bejoy Chand Mahatab v. Sarathkumar Roy*
 (1925) A I R 1925 Cal 931 (933) 85 Ind Cas 594, *Abhoy Shankar Mazumdar v. Satyendra Prasanna Bose*.
 (1925) A I R 1925 Cal 316 (318) 82 Ind Cas 318, *Harisadhan Patari v. Dmanath Banerjee*.
 (1934) A I R 1934 Pat 485 (489) . 154 Ind Cas 1032, *Tharichhna Kuari v. Ramyad Kuar*
 (1928) A I R 1928 Bom 287 (288) 110 Ind Cas 303, *Keshav Raghunath v. Gound Chinnaji*
 (1935) A I R 1935 Cal 760 (761) 159 Ind Cas 752, *Bhabani Prosanna v. Manindra Chandra*
 (1906) 3 Cal L Jour 316 (331), *Ananda Hari Basack v. Secretary of State*.
 (1912) 11 Ind Cas 609 (623) (Cal), *Secretary of State v. Kalika Prasad*.
 (1932) A I R 1932 Oudh 140 (142) 136 Ind Cas 700, *Sillabakhsh Singh v. Subadar*
 (1918) A I R 1918 Nag 171 (173) 47 Ind Cas 892, *Prahlad Singh v. Abdul Aziz Khan*
 (1917) A I R 1917 Cal 469 (479) . 36 Ind Cas 890, *Ramchandra Sil v. Raman Mani Das*
 (1935) 163 Ind Cas 897 (903) 62 Cal L Jour 177 (188) . 63 Cal 300, *Surendra Kumar Roy v. Ahmad Nauab Choudhry*.
 (1923) A I R 1923 Cal 82 (85) 77 Ind Cas 564, *Jobeda Khatun v. Tulsi-charan Das*.
 22. (1934) A I R 1934 P C 23 (25) 147 Ind Cas 515 . 61 Ind App 78 : 61 Cal 262 (P C), *Secretary of State v. Debendralal Khan*.

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Notes 16-18

If the elements stated above, namely, (a) that the possession of the wrongdoer must be in denial of the title of the true owner and (b) that it must be adequate in continuity, in publicity and in extent, exist, the possession must be regarded as adverse. It is not necessary that the owner should be shown to have *protested* that his rights were being violated and that the possession went on adversely to his protests.²³

17. "Defendant." — The word "defendant" has been defined in Section 2 sub-section 4 *ante* as including any person from or through whom a defendant derives his liability to be sued.¹ See Notes to that sub-section *ante*.

18. Possession is not adverse if it can be referred to a lawful title.—Where the possession may be lawful or unlawful it must be assumed, in the absence of evidence, that the possession is lawful.¹ It is also a fundamental principle that where a possession can be referred to a lawful title, it will not be considered to be adverse.²

- (1919) A I R 1919 P C 62 (68) : 43 Mad 253 : 46 Ind App 204 : 53 Ind Cas 288 (P C), *Arunachalam v Venkatchalapathy*.
 (1935) A I R 1935 P C 86 (38) : 153 Ind Cas 929 : 14 Pat 327 : 62 Ind App 40 (P C), *Srischandra Nandy v. Dasmath Jugul Kishore*.
 (1919) A I R 1919 Cal 126 (127) : 50 Ind Cas 649, *Panehu Muchi v. Bhuto Muchi*.
 (1935) 164 Ind Cas 61 (63) : 62 Cal 921, *Upendranath Roy v. Jitendranath Kundu*.
 (1938) A I R 1938 Lah 6 (8) : 170 Ind Cas 991, *Mt. Shanti Devi v. Mani Singh*.
 23. (1919) A I R 1919 P C 62 (68) : 43 Mad 253 : 46 Ind App 204 : 53 Ind Cas 288 (P C), *Arunachalam v. Venkatchalapathy*

Note 17

1. (1933) A I R 1933 Nag 274 (277) : 30 Nag L R 18 : 150 Ind Cas 679, *Mt. Jyoti v. Zabu*.
 (1910) 8 Ind Cas 1095 (1095) : 33 All 224, *Ram Lakhan Rai v. Gajadhar Rai*.
 (1910) 6 Ind Cas 467 (471) (Cal), *Khiroda Kanta Roy v. Krishna Das Laha*.
 (1921) A I R 1921 Bom 48 (48) : 45 Bom 570 : 59 Ind Cas 805, *Ramchandra Balwant v. Balaji Ganesh*.

Note 18

1. (1918) A I R 1918 P C 1 (2) : 1918 Pun Re No. 64 : 47 Ind Cas 626 (P C), *Harjit Singh v. Gurmukh Singh*.
 (1936) A I R 1936 Lah 673 (674) : 160 Ind Cas 1033, *Mohammad Yakub v. Abdul Karim*.
 (1923) A I R 1923 All 418 (419) : 71 Ind Cas 1033, *Jharap Rai v. Jasnt Rai*.
 *Rai v. Shyam Bahadur*.
 *v. Adoo Shaikh*.
 : 78 Ind Cas 895, *Indar*.
 .
 (1900) 2 Bom L R 410 (411), *Basapa v. Basapa*.
 (1865) 3 Suth W R 12 (12), *Dhressur Banerjee v. Oncooda Churn Banerjee*.
 (1930) 125 Ind Cas 739 (739) (Cal), *Kuda Koch v. Madan Gopal Agarwalla*.
 (1860) 12 Suth W R 217 (218) 3 Beng L R A C 312, *Selam Sheikh v. Daidonath Ghatak*.
 (1921) A I R 1921 Cal 617 (652) : 67 Ind Cas 31, *Jagannath v. Chandu Dibi*.
 (1912) 16 Ind Cas 27 (28) (Mad), *Rayilu Patter v. Annakutti Mannadiar*.
 2. (1914) A I R 1914 P C 213 (215, 216) (P C), *Corea v. Appuhamy*.

The reason is that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another title. The leading case on the point is *Thomas v. Thomas*,³ decided by the Court of Chancery in the year 1855. In that case X was entitled under the marriage settlement of his father and mother to certain real estates upon the death of his mother, to whom a life estate had been given therein. The mother died in 1832. X attained majority in 1836. The father remained in possession of the settled estate till his death in 1852. The question was whether the father's possession was adverse to X or whether it must be deemed to have been as guardian of X. Wood, V. C., observed as follows:

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Note 18

"But there is another principle which affects this case, namely that possession is never considered adverse if it can be referred to a lawful title. An important authority on this point is *Doe d. Milner v. Brightwen*,⁴ where a party who had taken possession of copyholds on the death of his wife, by an adverse title, lived more than twenty years afterwards and it was then found that there was an old custom of the manor by which he had a right to curtesy, and therefore his possession was referred

- (1927) A I R 1927 Nag 104 (106) 22 Nag L R 175 100 Ind Cas 446, *Mt. Deshrani v. Kishore Singh*.
 (1930) A I R 1930 Nag 300 (303) 27 Nag L R 152: 127 Ind Cas 589, *Jairam v. Bhilaji*.
 (1891) 1891 Bom P J 232, *Sheshu kom Ramaya v Venkatramna*.
 (1936) A I R 1936 Cal 106 (109) 161 Ind Cas 450, *Nirmal Chandra v. Mohitosh Das*.
 (1928) A I R 1928 Oudh 449 (460) 112 Ind Cas 522, *Mohammad Jamil v. Mohammad Hafiz*.
 (1936) A I R 1936 Pat 136 (140) 161 Ind Cas 831, *Mt. Bibi Zainab v. Muhammad Ayub*.
 (1923) A I R 1923 All 418 (419) 71 Ind Cas 1033, *Jharap Ras v Jaint Ras*.
 (1902) 4 Bom L R 964, *Yesu v Fulchand*.
 (1924) A I R 1924 Oudh 266 (270, 271) 27 Oudh Cas 77 78 Ind Cas 895, *Indarpat Singh v. Thakur Din Singh*.
 (1918) A I R 1918 Cal 532 (533, 534) 42 Ind Cas 884, *Gnanendra Nath v. Mohendra Mohini Debye*.
 (1927) A I R 1927 All 554 (555) 101 Ind Cas 621, *Ram Bharos Pande v. Dhurjati Upadhyaya*.
 (1930) A I R 1930 All 109 (110) 121 Ind Cas 701 : 52 All 222, *Dhurjati Upadhyaya v. Ram Bharos Pande*.
 (1912) 16 Ind Cas 27 (28) (Mad), *Raylu Patier v Annakutis Mannadiar*.
 (1916) A I R 1916 Cal 59 (59) 35 Ind Cas 26, *Bisheshwar Gangooly v. Bhagabati Charan*.
 (1915) A I R 1915 Mad 121 (122) 26 Ind Cas 316, *Punnusuamy Iyer v. Permoie*.

the man and not adversely)

(1867) 2 Agra 78 (78), *Naram Sahai v. Posoo*]

- 3 (1855) 110 R R 107 (110) 4 W R (Eng) 135 : 2 Kay & J 79 25 L J Ch 159: 1 Jur (N S) 1160.
 4 (1809) 10 East 583 (594) 10 R R 395 103 E R 897.

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Notes 18-19

to that title which was consistent with the title of the other party.

"In this case a father, who had several children entitled to estates on the death of his wife, all the children being under age at that time, entered upon the estates I think I must reasonably infer that the entry was an entry on their behalf and as their guardian, and was totally different from the case of a mere stranger entering upon the property under similar circumstances.

"Then it is said that, though the entry might have been lawful in its inception, the retention of the property after the children attained twenty-one barred their rights under the statute of limitation; but I think the better and sounder view here is that, if this gentleman entered as guardian, this Court would never allow him to set up any other title to the estate."

In *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee*,⁵ Markby, J., observed :

"One who holds possession on behalf of another does not, by a mere denial of that other's title, make his possession adverse so as to give himself the benefit of the statute of limitation."

In *Corea v. Appuhamy*,⁶ their Lordships of the Privy Council observed, following *Thomas v. Thomas*⁷:

"Entering into possession, and having a lawful title to enter, he *could not divest* himself of that title by pretending that he had no title at all."

See also the undermentioned case.⁸

19. Possession by Hindu female.—The possession by a female *heirress* under Hindu Law, of property *inherited by her* is not adverse to the reversioners who are entitled to the property after her death.¹ The reason is twofold: *first*, that in such cases the possession must be referred to her title as heirress, in which capacity

5. (1878) 4 Cal 327 (329) : 2 Shome L R 106.

6. (1914) A I R 1914 P C 243 (245) : 1912 A C 230 : 61 L J P C 151 (P C).

7. (1855) 110 R R 107 (110) : 4 W R (Eng) 135 : 2 Kay & J 79 : 25 L J Ch 159 : 1 Jur (N S) 1160.

8. (1914) A I R 1914 Mad 235 (239) : 22 Ind Cas 271, *Official Assignee v. Moorli Doss*. (A man possessing himself of property in one character, cannot himself alter that character and begin to possess it in another character.)

Note 19

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Jaggannath Prasad
(1929) A I R 1929 Oudh 215 (219) : 115 Ind Cas 279, *Chandra Shekhar*

she would only take a life-estate contemplated by Hindu Law, and *secondly*, that the reversioners not being entitled to the possession of the property till the death of the heiress, time will not, as will be seen in Notes 79 and 83 *infra*, run against them. *A* was entitled to a certain house but could get possession thereof only on the death of *B*, his mother, who had a right of residence therein. The house was sold in execution of a decree obtained against her son *A* and was purchased by one *X*. During the lifetime of *B*, *C* was living in the house. When *X* sued for possession on the mother's death, *C* resisted the suit on the ground that he had been in adverse possession for more than twelve years though within twelve years of *B*'s death. It was held by the Privy Council that *C*'s possession was not adverse to *X* till *B*'s death.² In *Ram Anugra Narain Singh v. Choudhry Hanuman Sahai*,³ where a Hindu widow took possession of her son's estate on his death, and she was his heiress, and remained in possession till her death, it was held by their Lordships of the Privy Council that the possession of the widow must be referred to her title as heiress of her son and that no case of adverse possession had been established.

Where a Hindu female who has no right to be in possession of the property gets into possession thereof, her possession will be adverse to those entitled to the property and she will prescribe for an *absolute* title to the property, unless it is shown that she was in possession under some arrangement with the owners or that she was prescribing only for a limited interest.^{3a} Thus, where the widow of a coparcener in a Hindu joint family was in possession of the family property in assertion of absolute ownership, it was held that her

(1878) 1878 Bom P J 237, *Nilkanth v. Shriram*. (Possession of lessee of widow not adverse during lifetime of widow.)

2 (1926) A I R 1926 P C 96 (97) 53 Ind App 201 53 Cal 948 97 Ind Cas 761 (P C), *Annada Prasad Das v. Ambika Prasad Das*

3 (1902) 30 Cal 303 (308) 30 Ind App 41 7 Cal W N 225 . 5 Bom L R 6 8 Sar 409 (P C), *Ram Anugra Narain Singh v. Hanuman Sahai*

3a (1925) A I R 1925 All 45 (46) . 49 All 713. 102 Ind Cas 175, *Rukhdeo Tewari v. Sukhdeo Tewari*

(1934) A I R 1934 Lah 270 (270) . 150 Ind Cas 108, *Mukh Ram v. Mt. Sundar*.

(1925) A I R 1925 Mad 1066 (1067) . 86 Ind Cas 296, *Sekhara Rao v. Ramaraju Seshayya*

(1914) A I R 1914 Mad 428 (429) 23 Ind Cas 594, *Muttayya v. Kodanda-ramayya*

(1914) A I R 1914 Mad 668 (665) 24 Ind Cas 680, *Vengudusamy Iyer v. Narayanasamy Iyer*

(1899) 9 Mad L Jour 33 (34), *Bapanayya v. Peddichalamayya*.

(1934) A I R 1934 Lah 633 (636) 152 Ind Cas 773, *Khem Chand v. Krishna Kumar*

(1926) A I R 1926 Oudh 126 (127) 90 Ind Cas 825, *Drigbijoy Singh v. Drigpal Singh*.

(1925) A I R 1925 Oudh 669 (670) 87 Ind Cas 164, *Lal Bahadur Singh v. Mathura Singh*

(1928) A I R 1928 Oudh 481 (482) . 113 Ind Cas 258, *Mt. Ram Dulari v. Sher Bahadur Singh*

(1929) A I R 1929 Oudh 215 (221) 115 Ind Cas 279, *Chandra Shekar Singh v. Jagjwan Baksh Singh*.

Arts. 142 & 144 Note 19

possession was adverse to the other members of the joint family and that she would acquire an absolute title to the property after twelve years of such possession.⁴ Similarly, where a Hindu female who is only entitled to maintenance and not to possession, obtains possession, such possession will be adverse to those entitled to possession so as to enable her to prescribe for an absolute title⁵ unless they could show that the possession was the result of some arrangement between them.⁶

The case would be different where a Hindu female enters into possession as an heiress under Hindu Law but subsequently she becomes disentitled to retain possession. Thus, where a Hindu widow

There is no presumption that the possession is that of a qualified owner:

(1911) 10 Ind Cas 63 (64) (Mad), *Kuppaswamy v. Srinivasalingar*.

(1936) A I R 1936 Oudh 340 (364, 368) . 163 Ind Cas 770, *Mata Bakhsh Singh v. Ajodhya Bakhsh Singh*.

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oolappa Nakh.
v. Raj Baha-

dur Kurms.

[See also (1920) A I R 1920 Nag 196 (198) : 16 Nag L R 221 : 56 Ind Cas 952, *Kasturi v. Lote Major*. (Hindu mistress entitled to maintenance but not to possession—Her possession is adverse to rightful owner.)

(1897) 21 Bom 110 (117), *Desai Ranchhodas v. Rawal Nathu Bhai*.

(1931) A I R 1931 Pat 114 (124) : 121 Ind Cas 337, *Chattri Kumari Devi v. Mohan Bikram Shah*.

(1911) 9 Ind Cas 50 (51) 33 All 312, *Gajadhar Pande v. Mt. Parbati*.]

4. (1919) A I R 1919 P C 60 (62) : 42 All 152 : 46 Ind App 197 : 55 Ind Cas 486 (P C), *Satgur Prasad v. Raj Kishore Lal*.

(1878) 2 Mad 23 (29) 5 Ind App 206 : 3 Cal L R 205 : 2 Ind Jur 616 : 2 Shome L R 128 : 3 Sar 850 (P C), *Zamindar of Pittapuram v. Proprietors of Mutta of Kolanka*.

(1894) 22 Cal 445 (450) : 22 Ind App 25 : 5 Mad L Jour 1 : 6 Sir 523 : R & J 136 (P C), *Lachhan Kunwar v. Manorath Ram*

(1874) 1874 Bom P J 24, *Rajee v. Rambhaje*.

(1924) A I R 1924 All 83 (91) : 45 All 729 : 74 Ind Cas 869, *Uman Shankar v. Mt. Aisha Khatun*.

(1924) A I R 1924 All 740 (742) : 83 Ind Cas 751 : 46 All 769, *Kali Charan v. Mt. Pearce*.

5. (1888) 1888 All W N 133 (134), *Sewa Ram v. Lachman Prasad*.

(1887) 1887 All W N 43 (43), *Narain Das v. Banshidhar*.

(1899) 1899 All W N 95 (95), *Kauldhar v. Raghur*.

(1927) A I R 1927 Oudh 138 (140) : 99 Ind Cas 890, *Rajabahadur Singh v. Kanhaiya Bakhsh Singh*.

(1925) A I R 1925 Oudh 729 (731) : 67 Ind Cas 1021, *Bhagwan Din v. Ajudhia*.

6. (1902) 29 Cal 664 (671, 673) : 29 Ind App 132 : 6 Cal W N 637 : 4 Bom L R 547 : 8 Sir 250 (P C), *Sham Koer v. Dah Koer* (The reference in the judgment to the other co parceners as "reversionary heirs" is an obvious mistake)

(1925) A I R 1925 Oudh 729 (730) : 67 Ind Cas 1021, *Bhagwan Din v. Ajudhia*.

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[See (1860) 12 Suth W R 154 (159) : 3 Peng L R A C 259, *Indubansi Kunwar v. Mt. Gribhirun Kunwar*.

entered into possession as heiress of her husband, but by reason of the birth of a posthumous son her possession became adverse to the son, it was held by their Lordships of the Privy Council that the adverse possession must be considered as relating only to a widow's estate under Hindu Law.⁷ Similarly, where a Hindu widow in possession of her deceased husband's property, forfeits her rights to the property on re-marriage⁸ or by conversion to another faith⁹ but continues in possession, her possession would be adverse to the reversioners only in respect of a limited estate in the property which she had prior to the forfeiture or the re-marriage. Likewise, where a Hindu daughter enters into possession of her father's property under a will giving her only a limited estate and it turns out that the will is invalid, it has been held that she will acquire only a limited estate by adverse possession.¹⁰ Again, where the acquisition of full ownership is prohibited by law as in the case of *watan* property in Bombay, a Hindu widow in possession can acquire by prescription only a limited estate therein.¹¹

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Note 19

It has been held in some cases¹² that the presumption, where a Hindu female without title enters into possession of property, is that her possession is adverse only to the extent of a limited interest in the property. It is submitted that this view is not correct

(1894) 8 C P L R 99 (100), *Gunesh Pandit v. Imrahal Lodhi*.

(1878) 2 Mad 23 (29) . 5 Ind App 206 . 3 Cal L R 265 . 2 Ind Jur 616 : 2 Shome L R 128 . 3 Sar 850 (P C), *Zamindar of Pittapuram v. Proprietors of Mulla of Kolanka* (Where such arrangement is proved, a suit within 12 years of her death is not barred.)

7. (1921) A I R 1924 P C 121 (122) . 5 Lah 192 . 51 Ind App 171 . 80 Ind Cas 788 (P C), *Mt. Lajwanti v. Safa Chand*

[See also (1939) A I R 1939 Oudh 17 (28) . 178 Ind Cas 950, *Jadunath Singh v. Birkeshar Singh*]

8. (1935) A I R 1935 Lah 537 (538) . 157 Ind Cas 1006, *Kishen Singh v. Mt. Partapi*

(1927) A I R 1927 All 274 (276) . 99 Ind Cas 578, *Tarif v. Phool Singh*

(1925) A I R 1925 All 369 (370) . 86 Ind Cas 445, *Umrao Singh v. Parthi*

(1929) A I R 1929 Lah 827 (828) . 119 Ind Cas 238, *Desa v. Dani*.

(1927) A I R 1927 All 523 (524) . 49 All 203 . 100 Ind Cas 734, *Mangat v. Bharto*.

(1933) A I R 1933 Lah 218 (219) . 141 Ind Cas 899, *Hassu v. Ibrahim*.

9 (1933) A I R 1933 Oudh 92 (93) . 7 Luck 320 . 141 Ind Cas 831, *Mt. Parbati v. Ram Prasad*

10. (1937) A I R 1937 All 197 (201) . 168 Ind Cas 541, *Suraj Prasad v. Gulab Dei*

(1908) 31 Mad 321 (327) . 18 Mad L Jour 409 . 4 Mad L Tim 5, *Narsimha Appa Rao v. Jagganadha Gopala Rao*

[See (1925) A I R 1925 Mad 497 (509) . 48 Mad 1 . 93 Ind Cas 705, *Maharaja of Kolhapur v. Sundaram Ayyar*]

11. (1928) A I R 1928 Bom 333 (335) . 114 Ind Cas 390, *Arya v. Gojra*

(1900) 27 Ind App 86 (91) . 24 Bom 556 . 4 Cal W N 517 . 2 Bom L R 548

7 Sar 710 (P C), *Padapa v. Suamirao*

12 (1925) A I R 1925 All 330 (330) . 85 Ind Cas 449, *Bindrabai v. Ram Narain*

[See also (1912) 15 Ind Cas 403 (404) (Mad), *In re Prathipati Seshayya*

(1929) A I R 1929 Bom 333 (334) . 119 Ind Cas 760, *Anant Patilrao v. Mahadeo Wasudco*]

**Arts. 142 & 143
Notes 19-20**

Where a widow enters into possession of property without a right to do so, the case is one of dispossession and a suit for possession against her or her alienee is consequently governed by Article 142.¹³

20. Possession under a temporary arrangement between members of a family.—*A*, one of the heirs of a deceased Muhammedan, sued the other heirs for recovery of the share of the property left by the deceased propositus. Pending the litigation the question with regard to the relinquishment of the share of *A*, in her favour, was agreed, by all the heirs, to be referred to arbitration. No reference was, however, actually made, but for several years subsequent to the agreement, a certain fixed sum out of the profits of the estate continued to be paid to *A*. It was held by the Privy Council that the agreement was merely a provisional one, that no title was thereby conferred on *A* with regard to the alleged share in the estate, and that the subsequent payments could not make out a case for *A* of adverse possession, as the possession must be referred to such title as *A* had and not to any higher title.¹

Where *B* was in possession under an agreement to surrender the land to *A*, it was held that his possession at the time of the surrender was not adverse to *A*, but that it became adverse when *B* refused to surrender the land as agreed upon.² Where *A* transferred property collusively in the name of *B*, in order to save the property from *A*'s creditors, it was held in the undermentioned case³ that as the transfer was a sham one intended to save the property from creditors, *B*'s ostensible possession must be deemed to have been

13. (1875) 7 N W P H C R 819 (351), *Gobardhan v. Balmukund*.
- (1923) A I R 1923 All 25 (26) : 45 All 1 : 75 Ind Cas 14, *Mt. Radha Dulaiya v. Rashik Lal*.
- (1937) A I R 1937 All 268 (270) : 169 Ind Cas 536 : I L R (1937) All 421, *Rashik Lal v. Mt. Radha Dulaiya*.
- (1928) A I R 1928 Lah 695 (696) : 109 Ind Cas 54, *Haikam Singh v. Hazara Singh*.
- (1935) A I R 1935 Bom 427 (431) : 159 Ind Cas 697, *Shankar Vinayak v. Ramrao Sahebrao*.
- (1926) A I R 1926 Nag 129 (133) : 89 Ind Cas 663, *Yeshwant v. Daulat*. (A Hindu widow is entitled to make her own disposal of her share in the property.)
- (1925) A I R 1925 Mad 820 (822) : 110 Ind Cas 613 : 51 Mad 815, *Muthuswami v. Pennayya*. (Widow having claim for residence and maintenance continuing in possession after death of last male holder but not as heir—Her possession is not wrongful at least till reversioners demand possession from her.)
- (1907) 1907 Pun Re No. 102 : 1907 Pun W R No. 78, *Bura Mal v. Narain Das*.
- (1932) A I R 1932 All 961 (361, 362) : 54 All 472 : 183 Ind Cas 363, *Mt. Ram Kunwar v. Amar Nath*.

Note 20

1. (1925) A I R 1925 P C 70 (74) 88 Ind Cas 149 (P C), *Karimunnissa Khatun v. Md. Fazlul Karim*.
2. (1876) 25 Sath W R 521 (523), *Bells v. Mahomed Ismail Chowdhry*.
3. (1919) A I R 1919 Oudh 420 (424). 22 Oudh Cas 222 : 53 Ind Cas 961, *Ashfaq Hussain v. Nazir Hussain*.

with the object of maintaining that design and was not therefore adverse to A. See also the undermentioned cases.⁴ **Arts. 142 & 143 Notes 20-21**

21. Possession in lieu of dower. — Where a Mahomedan widow obtains possession of her husband's estate peaceably and without force or fraud, she is entitled to retain possession of it till her dower debt is paid. The right is, however, not the same as that of a mortgagee to possession which is founded on contract. The possession in lieu of dower is not adverse to the heir, who can on payment of the dower, get back the property. When the heirs of a deceased Mahomedan sued his widow for immediate possession and the suit was decreed on condition that the plaintiffs were to pay the widow a certain amount as being the balance of the dower debt within a certain time, and on failure to pay it the suit was dismissed, and the widow thereupon sold the property to a third person, it was held by their Lordships of the Privy Council that the non-payment had not the effect of conferring an absolute estate on the widow and that the decision in the previous suit did not extinguish the plaintiff's right to claim possession at any future time.¹ See also the undermentioned cases.^{1a}

It is not necessary for possession to be peaceable and without force or fraud that it should have been obtained by the widow with the consent of the husband's heirs. In *Bebee Bachun v. Sheikh Hamid Hussain*,² where on her husband's death the widow had got into possession without the consent of the heir and obtained

4. (1918) A I R 1918 Lah 6 (8) . 48 Ind Cas 114, *Mt. Chuhan Bai v. Ramnand* (The possession of a small residential house by a widow under an arrangement with her sons in exercise of her right of residence is not adverse to the sons.)

(1915) A I R 1915 Low Bur 86 (87, 88) 31 Ind Cas 875, *Ma Min Kym v. Maung Wa* (Working lands in turns by mutual arrangement — No adverse possession)

Note 21

1. (1905) A I R 1905 D G 39 (56) 53 Ind App 145 47 All 250 : 86 Ind Cas 579

2. 8 Ind Cas 833, *Abdulla v.*

(1921) 65 Ind Cas 224 (230) (Pat), *Abdul Rahman v. Wali Muhammad*.

(1923) A I R 1923 Pat 72 (74) 68 Ind Cas 601 2 Pat 75, *Abdur Rahman v. Sheikh Wali Mahamed*.

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widow

[But see (1930) 120 Ind Cas 557 (558) (All), *Mt. Mahmuda Bibi v. Abdul Hamid*

(1929) A I R 1929 All 326 (327) 119 Ind Cas 445, *Karam Ali v. Md. Latif*.]

2. (1871) 14 Moo Ind App 377 (384) 10 Beng L R 45 17 Suth W R 113 : 2 Suther 531 3 Sar 39 (P C).

**Arts. 142 & 144
Notes 21-22**

registration of her name as owner in the Collectorate in spite of the opposition of the heir to such application, it was held by their Lordships of the Privy Council that the widow was entitled to retain possession till her dower debt was paid. The contrary view expressed in the undermentioned case³ that where the widow enters into possession without the *consent* of the heirs her possession would be adverse to the heirs and that the widow would obtain an absolute title after twelve years is, it is submitted, not correct.

In *Mutsadi v. Habib Mian*,⁴ a Mahomedan widow entered into possession of her husband's property on his death partly as heir and partly as a creditor in respect of her dower debt and during the course of such possession asserted a hostile title by getting herself recorded as owner in the Record of Rights. Though she was liable to render accounts to the heirs so that they might ascertain the period of time at which her dower debt became discharged, she never furnished any accounts. It was held by a single Judge of Patna High Court that the widow acquired an absolute title to the property by lapse of time. It is submitted that this view also does not seem to be correct in view of the two Privy Council cases referred to above.

The lien of a Mahomedan widow over the property of her deceased husband of which she has come into peaceful possession in lieu of her dower, operates only so long as she remains in possession and gives her merely a right of retention and no title. Consequently if the widow is dispossessed by an heir of the husband, her remedy would be a suit under Section 9 of the Specific Relief Act, 1877. She cannot maintain a suit for possession against the heir based on her title arising from prior possession, as such title is available only against persons other than the rightful owner.⁵

22. Possession in lieu of maintenance. — See also Note 19 *ante*.

Where a person is in possession (under an agreement) in lieu of maintenance for his life, his possession is not adverse to the person entitled after his death.¹ The basis of the rule is that a person who has a lawful title to possession, cannot disclaim that title and claim to be in wrongful possession. As has been seen in Notes 18 and 19 *ante*, possession must be referred to the title which the possessor has. Such a person cannot obtain a title by adverse possession against the person entitled after his death.²

3. (1869) 3 Agrn 279 (279), *Mt. Oomrao Begum v. Hamid Jan*.

4. (1917) A I R 1917 Pat 320 (322) : 39 Ind Cas 579.

5. (1927) A I R 1927 All 531 (535) : 103 Ind Cas 363 : 50 All 86, *Mashal Singh v. Ahmad Hussain*.

Note 22

1. (1925) A I R 1925 P C 132 (135) : 83 Ind Cas 335 (P C), *Mt. Bhagwani Kunwar v. Mohan Singh*.

(1926) A I R 1926 Nag 129 (132) : 89 Ind Cas 663, *Yeshwant v. Daulat*.

2. (1925) A I R 1925 P C 132 (135) : 83 Ind Cas 335 (P C), *Mt. Bhagwani Kunwar v. Mohan Singh*.

But where *A* was in possession under a grant for maintenance from *B*, but *B* obtained a *decree for resumption of the grant* but having obtained a decree did nothing further, and *A* continued in possession for twelve years, it was held by the Privy Council that the possession of *A* from that date was adverse to *B*.³ The reason is that the possession in such a case could not be referred to any lawful title and was really without any title

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Notes 22-24

23. Possession by the holder of a life estate, if can be adverse to reversioners.—The possession of a person who has only a life estate in the property possessed is not adverse to the person who would be entitled to the property on the death of the former. As has been seen in Note 19 *ante*, the reason is that the possession must be referred to the title which the possessor has, that being only a life estate. Further, the reversioner not being entitled to the property until the death of the life estate holder, there can, as will be seen in Note 79 *infra*, be no adverse possession against him. The mere fact that the life estate holder asserts that he has an absolute estate will not enable him to acquire an absolute title by adverse possession.¹

24. Possession of property belonging to person under disability.—Where a person enters into possession of property belonging to a person under disability, such as a minor or a lunatic, and the relationship of the parties and the circumstances of the case are such as would, in equity, fasten on the person so entering into possession a trust actual or constructive, the possession of such person would be presumed to be that of a bailiff or agent of the person under disability, and not adverse to him. Thus, the possession of a *de facto* guardian would be presumed to be on behalf of the minor as his bailiff or guardian and not adverse to him.¹ In *Thomas v.*

3. (1928) A I R 1928 P C 165 (165) 109 Ind Cas 818 (P C), *Kesho Prasad Singh v. Madho Prasad Singh*.

Note 23

1. (1928) A I R 1928 Oudh 67 (91) : 109 Ind Cas 835, *Mohammad Ali Khan v. Nisar Ali Khan*.

Note 24

1. (1938) A I R 1938 Nag 89 (91) : 173 Ind Cas 103, *Ramji v. Madhi*.
(1928) A I R 1928 Mad 1113 (1117) : 51 Mad 977 : 117 Ind Cas 113, *Mahalakshamma v. Suryanarayana*.
(1910) 8 Ind Cas 639 (642) : 12 Bom L R 956 (969) : 35 Bom 79, *Vasudeo Atmaram v. Eknath Balkrishna*.
(1938) A I R 1938 Mad 513 (516) : 177 Ind Cas 225, *Ramayya v. Lakshmayya* (Hindu dying leaving minor widow—Her mother-in-law taking possession—Mother-in-law's possession must be presumed to be on behalf of her daughter-in-law.)
(1929) A I R 1929 Oudh 153 (154) : 4 Luck 592 : 115 Ind Cas 101, *Mt. Lachmin v. Ishur Prasad* (Do.)
(1926) 51 Mad L Jour 54 (N R C).
(1903) 27 Bom 51 (40) : 4 Bom L R 751, *Jotaram v. Ram Krishna*.
(1928) A I R 1928 Nag 275 (277) : 108 Ind Cas 435, *Mayadad Khan v. Hazari Lal*. (Mahomedan father)
[See also (1911) 9 Ind Cas 505 (506) (Mad), *Thandayaraya Odayan v. Narayana Goundan*. (Property allotted to minor on partition

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Note 24

Thomas,² the principle on which the possession was not regarded as adverse to the minor was stated to be that the possession must be referred to the title of the possessor as guardian, and that possession is never considered adverse if it can be referred to a lawful title. In that case a father entered into possession of a certain estate belonging to his children. Vice Chancellor Sir W. Page Wood observed as follows:

"In this case a father, who had several children entitled to estates on the death of his wife, all the children being under age at that time, entered upon the estates. I am of opinion, that, *prima facie*, unless there is strong evidence to the contrary, his entry must be taken to be on behalf of his infant children and as their natural guardian—the guardian in socage of the plaintiff he could not be, for such guardianship terminates when the child attains fourteen years of age; but considering the right of the father as the natural guardian of the infant plaintiff, and the practice of this Court in making allowances for maintenance, he having entered and received the rents and profits, and there being no evidence of his not having discharged the obligation imposed upon him of maintaining his children, remembering the fact that they were all under his own charge and were infants, I think I must reasonably infer that the entry was an entry on their behalf and as their guardian and was totally different from the case of a mere stranger entering upon property under similar circumstances."

In *Ma Ngue Nang v. Maung Tha Maung*,³ A, a father, conveyed a share of certain property to B, his daughter who was a minor, but continued to be in possession admitting B's title to it. It was held by their Lordships of the Privy Council that such possession was not adverse to the daughter. Similarly, in *Ghulam Mohamed v. Ghulam Hussain*,⁴ where a mother was in possession of certain properties belonging to her minor children, it was held by their Lordships of the Privy Council that such possession was not adverse to the minors.

but the uncle continuing in possession after partition—*Held*, presumption was that the uncle held possession for his minor nephew.)]

2. (1855) 110 R R 107 (110) : 2 Kay & J 79 : 25 L J Ch 159 : 1 Jur (N S) 1160 : 4 W R (Eng) 135.
3. (1929) A I R 1929 P C 55 (57) : 7 Rang 4 : 114 Ind Cas 595 (P C).
4. (1932) A I R 1932 P C 81 (87, 88) : 59 Ind App 74 : 54 All 93 : 136 Ind Cas 454 (P C).

See also the following cases to a similar effect :

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| <p>(1900) 111 R R 100 (110) : 2 Kay & J 79 : 25 L J Ch 159 : 1 Jur (N S) 1160 : 4 W R (Eng) 135.</p> <p>mal.</p> <p>[See also (1911) 11 Ind Cas 93 (94) (Oudh), <i>Bhagwan Das v. Ishar Dat.</i> (Son of feeble intellect.)]</p> | <p><i>v. Ram-</i>
<i>ter's pro-</i>
<i>from the</i></p> <p>Indalam-</p> |
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The presumption in the above cases, is, however, a rebuttable one, and it is open to the guardian to show that he entered into possession on his own behalf adversely to the minor.⁵ But once it is shown that possession once commenced as a guardian, it will continue to be so even after the wards attained their majority.⁶ For, as observed in *Thomas v. Thomas*,⁷ once a person enters as guardian, the Court would never allow him to set up any other title to the estate. In the undermentioned cases,⁸ the view has been assumed that a person entering on the property of a person under disability under circumstances rendering such possession one on behalf of the latter, can make his possession hostile and adverse by asserting a hostile title by some overt act after the disability has ceased.

It has been held by the High Court of Bombay in the undermentioned case,⁹ following the English case of *Morgan v. Morgan*,¹⁰ that even where a mere stranger enters on the property of persons under disability, his possession must be considered to be that of a bailiff or agent of the person under disability.^{10a} The High Court of Madras has, on the other hand, held, following *Thomas v. Thomas*,¹¹ that it cannot be stated as a general proposition that there could be no adverse possession of property which belongs to a person under disability during the continuance of the disability and that the

(1909) 1 Ind Cas 120 (122) : 33 Bom 293, *Umabai Mangeshrao v. Vithal Vasudeo Shetti* (Mother's possession presumed to be as guardian)]

5 (1923) A I R 1923 Oudh 61 (76) . 74 Ind Cas 225, *Rudra Pratap Singh v. Nirman Prasad Singh*

[See also (1910) 7 Ind Cas 505 (525) (Lab), *Husaina v. Sahib Nur*]

6. (1873) L R 17 Eq 378 (399, 400) 43 L J Ch 495 29 L T 862 22 W R (Eng) 290, *Howard v. Earl of Shrewsbury*.

(1910) 8 Ind Cas 639 (642) 12 Bom L R 956 (968, 969) 35 Bom 79, *Vasudeo Atmaram v. Eknath Balkrishna*

7. (1855) 110 R R 107 (110) 2 Kay & J 79 . 25 L J Ch 159 1 Jur (N S) 1100 . 4 W R (Eng) 185.

8. (1910) 8 Ind Cas 639 (642) . 35 Bom 79, *Vasudeo v. Eknath*.

(1889) 1889 Bom P J 219 (219), *Govind v. Jaya*. (Plaintiff's expulsion from the house amounts to such overt act)

(1910) 8 Ind Cas 728 (730) (Oudh) *Mohammad Azim Khan v. Brijraj Singh*. (Mere mutation of names in guardian's favour not such an overt act)

(1933) A I R 1933 Bom 287 (293) 57 Bom 488 145 Ind Cas 262, *Fahugouda v. Dyamawa*

(1933) A I R 1933 Nag 387 (389) 148 Ind Cas 237 30 Nag L R 88, *Sheodmal v. Narayandas* (Mere letting out of a portion of the property in his own name, by a person looking after the same during the minority of the rightful owner or person for whom it is natural to do so, does not amount to such assertion of title or ouster as to bar the title of the rightful owner by adverse possession)

9. (1910) 8 Ind Cas 639 (642) 35 Bom 79, *Vasudeo Atmaram v. Eknath Balkrishna*

10 (1737) 1 Atk 489 (489) 26 E R 310 (The rule applies even to a stranger entering into possession of a minor's property)

10a See (1903) 2 Ch 40 (61) 72 L J Ch 473 83 L T 403 51 W R 504, *In re Diss, Diss v. Diss* (Possession of a stranger of infant's property must be taken to be as a bailiff or agent for the infant)

11. (1855) 110 R R 107 (110) 4 W R (Eng) 135 2 Kay & J 79 25 L J Ch 159; 1 Jur (N S) 1160

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Notes 24-25**

question in each case has to be decided with reference to the anterior relationship between the person taking possession and the person under disability, and to whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would, in law, make him only an agent or a bailiff of the person under disability.¹² The High Court of Bombay also has in a later case held that a distinction is to be drawn between the possession of the guardian and the possession of a stranger between whom and the minor there is no antecedent relationship.¹³

It was held in the cases cited below¹⁴ that where the guardian conveyed the minor's property to a stranger, who purchased it *bona fide*, his possession would be adverse from the date of his entry on the property.

Where a person enters into possession on behalf of a person under disability, a suit by the latter or his representative against the former for possession would be governed by Article 141, inasmuch as the original entry of the defendant was not adverse to the plaintiff.¹⁵

25. Possession of insolvent.—There is a conflict of opinion as to whether the possession of property by an insolvent after his adjudication and before his discharge can be adverse against the Official Receiver or Assignee. In *Krishtocomul Mitter v. Suresh Chunder Deb*,¹ Mr. Justice Wilson expressed the opinion that the possession by the insolvent may be adverse to the Official Assignee. This view was followed by Mr. Justice Bakewell in *Balkrishna Pillai v. Narayanasamy Naidu*.² In *Official Assignee v. Moorli Doss*,³ Wallis, J., dissented from the view expressed in *Krishtocomul's case*¹ and held that the possession of the insolvent is not adverse to the Official Assignee. He rested this view on two grounds: *first*, that the insolvent acquiring property is to be regarded as the *agent* of the Official Assignee, that his possession must therefore be referred to his title as agent and was not adverse to the Assignee; *secondly*, that even if the insolvent acquired property by adverse possession, it would *eo instanti* become vested again in the Official Assignee. The case went up on appeal in *Ratna Bai v. Official Assignee*.⁴

12. (1922) A I R 1922 Mad 12 (15); 45 Mad 361; 70 Ind Cas 678, *Sectaramaraju v. Subbaraju*.

13. (1933) A I R 1933 Bom 287 (297); 57 Bom 488; 145 Ind Cas 262, *Fakir-gowda v. Dyamawa*.

14. (1930) A I R 1930 Mad 703 (710); 126 Ind Cas 632, *Sorimuthu Thondeman v. Perumal Ammal*.

[See also (1893) 1893 Bom P J 403 (405), *Vishvanath v. Vaman*.]

15 (1910) 8 Ind Cas 639 (643); 35 Bom 79, *Vasudeo Atmaram v. Ehnath Bal-Krishna*.

Note 25

1. (1886) 8 Cal 556 (559); 12 Cal L R 253.

2. (1912) 17 Ind Cas 14 (15) (Mad).

3. (1914) A I R 1914 Mad 238 (239); 22 Ind Cas 271.

4. (1916) A I R 1916 Mad 415 (417); 29 Ind Cas 163.

before a Bench of two Judges. The judgment of Wallis, J., was confirmed, but different reasons were given for coming to that conclusion. According to Mr. Justice Sadasiva Iyer, the insolvent was in the position of an *express trustee* for his creditors by force of statutory provisions, and, since a trustee cannot plead adverse possession as against the *cestui que trust*, his possession cannot be adverse to the creditors and therefore to the Official Assignee who represents the creditors. He was also of opinion that on the analogy of the rule that limitation ceases to run as soon as a suit is filed whatever be the length of time during which the suit is pending, time will not run against the Official Assignee during the pendency of the Insolvency proceedings. Mr. Justice Napier, the other Judge constituting the Bench, doubted whether the doctrine of agency could be applied as *between* the insolvent and the Official Assignee, though it might be resorted to in regard to the relations between the insolvent and third parties. He also doubted whether the doctrine of agency was an answer to the claim by adverse possession. But he held that the Limitation Act did not apply to such cases.

26. Possession of mortgagor, when becomes adverse to the mortgagee.—A executes a *simple* mortgage in favour of B and remains in possession of his property. His possession or the possession of his transferee cannot be adverse to B for the reason that he is not entitled to possession at all under his mortgage^{1a} (See Note 78 *infra*) A executes a mortgage in favour of B. There is a stipulation in the mortgage deed that on default in payment as specified in the document, the mortgagee would be entitled to take possession of the mortgaged property. A commits default. It has been held that the possession of the mortgagor from the date of default would be without title and would be adverse to the mortgagee, and that a suit by the mortgagee would be barred after twelve years from that date¹ In the undermentioned case,² a mortgagee was entitled under the terms of the mortgage to enter into possession of the mortgaged property on default in payment committed by the mortgagor. After the occurrence of the default contemplated, a third person obtained a money decree against the mortgagor, purchased the property himself in execution of his decree and was in possession thereof believing himself *bona fide* to be a full owner. It was held by the Privy Council that his possession was adverse to the mortgagee and that the latter could not recover the property after twelve years.

Note 26

1a (1916) A I R 1916 Oudh 232 (233) 33 Ind Cas 657 18 Oudh Cas 363, *Mahesh Baksh Singh v Manohar Lal*

1. (1871) 14 Moo Ind App 144 (150) 8 Beng L R 104 16 Suth W R P C 33 2 Suther 490 2 Sir 711 (P C), *Brojonath Koondoo v Khelut Chunder Ghose*

[But see (1874) 22 Suth W R 543 (545) 14 Beng L R 315, *Mt Munkee Koor v Shaikh Munnoo* (Possession of mortgagor after default of payment is with permission of mortgagee)]

2. (1871) 14 Moo Ind App 101 (111, 112) 16 Suth W R P C 19 8 Beng L R 122. 2 Suther 457 2 Sir 698 (P C), *Anundo Moyee Doss v Dhondro Chunder*

Arts. 142 & 144
Notes 26-28

But, can the mortgagee sue on his mortgage, even though his right to possession may be barred by reason of the adverse possession of the mortgagor for twelve years? It has been held in the under-mentioned case³ that a suit on the mortgage would not be barred. In cases of mortgages by conditional sale governed by the old Bengal Regulation 17 of 1806, there was no provision for a suit for foreclosure but the mortgagee who wished to foreclose had to get a notice issued to the person entitled to redeem, of his intention to foreclose. The person entitled to redeem had one year of grace allowed to him from the date of such notice to redeem the mortgage. After the expiry of the year of grace the mortgagee became the full owner, and the mortgagor's right of redemption was foreclosed and lost. The possession of the mortgagor after the expiry of the year of grace would be adverse to the mortgagee and a suit for possession twelve years after the year of grace expired, would be barred by limitation.⁴ Where in such a mortgage there was also a stipulation that on default the mortgagee would be entitled to take possession of the mortgaged property, and default was committed, it was held that the possession of the mortgagor after the date of the default was adverse to the mortgagee,⁵ and if the mortgagee's suit for possession became barred before the coming into force of the Transfer of Property Act (which created the right to sue for foreclosure), the mortgagee's rights were barred not only in respect of the right to possession but also in respect of the right to enforce the mortgage itself.⁶

See also Note 9 to Article 135, *ante*.

27. Possession of a co-mortgagor who redeems the mortgage.—See Note 3 to Article 148, *infra*.

28. Possession of mortgagee.—Where a mortgagee who is not entitled as such to the possession of the mortgaged property, enters into possession of such property without title, his possession is clearly adverse to the mortgagor from the date of his entry into such possession.¹ Thus, where a mortgagee not entitled to possession

3. (1913) 21 Ind Cas 773 (773) (Mad), *Kondayya v. Subbayya Chetty*.

4. (1918) A I R 1918 Lah 198 (201) : 45 Ind Cas 563 : 1918 Pun Re No. 79 : *Ratan Das v. Mt. Guran*.

(1884) 10 Cal 68 (72) : 13 Cal L R 53, *Modun Mohun Choudhry v. Ashad Ally Beparee*.

5. (1916) A I R 1918 Lah 198 (201) : 45 Ind Cas 563 : 1918 Pun Re No. 79, *Ratan Das v. Mt. Guran*.

(1884) 10 Cal 68 (71, 72) : 13 Cal L R 53, *Modun Mohun Chowdhry v. Ashad Ally Beparee*.

Rai v. Bhargu Rai.

, 276) : 1912 Pan Re No, 91,

Note 28

1. (1931) A I R 1931 Oudh 69 (71) : 127 Ind Cas 252, *Humayun Qadar v. Surayya Begam*.

(1914) A I R 1914 Lah 189 (189) : 25 Ind Cas 616, *Mula Singh v. Budh Singh*.

by virtue of his mortgage, enters on the property by virtue of a purchase from the mortgagor which is found to be invalid, his possession will be adverse to the mortgagor.² Similarly, where a mortgagee not entitled to possession as such obtained a foreclosure decree under Bengal Regulation 17 of 1806 and in pursuance thereof obtained possession of the mortgaged property, it was held that if the decree was found not binding on the mortgagors, the possession of the mortgagees would be adverse to the mortgagors.³

A mortgagee *entitled to possession* of the mortgaged property under the terms of his mortgage, cannot, during the subsistence of the mortgage, convert his possession, by assertion or unilateral act, into one adverse to the mortgagor.⁴ The reason is that his possession

Arts. 142 & 143
Note 28

(1926) 93 Ind Cas 934 (935) (Lah), *Jawahar v. Amar Chand*.

2. (1934) A I R 1934 Lah 902 (904) . 16 Lah 12 : 154 Ind Cas 243, *Nizam Din Khan v. Rashid Ali Khan*

3. (1892) 1892 All W N 1111 (1112) (Cal), *Shah v. Shah*

4. (1862) 1862 Suth

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not apply and possession of the mortgagee will not become adverse.)

(1904) 32 Cal 206 (312) 32 Ind App 23 9 Cal W N 201 2 All L Jour 71

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(1866) 1866 Pun Re No. 58, *Chiragh Shah v. Ghuseeta*.

(1925) A I R 1925 Oudh 182 (183) . 80 Ind Cas 592, *Ram Chhor Baksh v. Ram Surat*.

(1906) 16 Mad L Jour 5 (6), *Lakshmi Nachiar v. Rama Chandra*.

(1932) A I R 1932 All 437 (439) 133 Ind Cas 306, *Arjun Singh v. Mahesha Nand*

(1925) A I R 1925 All 417 (419) 86 Ind Cas 849, *Ram Prasad Singh v. Babu Lal*.

(1920) A I R 1920 Oudh 302 (303) 23 Oudh Cas 269 60 Ind Cas 404, *Tilak Chand v. Shambhu Singh*.

(1923) A I R 1923 Lah 71 (72) 69 Ind Cas 883, *Zora v. Chandu*

(1926) A I R 1926 Oudh 491 (492) 92 Ind Cas 832, *Dajrang Dali v. Mt. Maharaja*.

(1924) A I R 1924 Bom 521 (522) 83 Ind Cas 145, *Shuappa Malappa v. Atali Lumanna*.

(1926) A I R 1926 Oudh 517 (518) 95 Ind Cas 849, *Nirankar Prasad v. Mt. Dechai*

Harri Krishna.

72 . 52 Ind Cas 159.

Mahomed Kamul v.

Mahomed Salim

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See also Note 9 to Article 135, *ante*.

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28. Possession of mortgagee.—Where a mortgagee who is not entitled as such to the possession of the mortgaged property, enters into possession of such property without title, his possession is clearly adverse to the mortgagor from the date of his entry into such possession.¹ Thus, where a mortgagee not entitled to possession

3. (1913) 21 Ind Cas 778 (779) (Mad), *Kondayya v. Subbayya Chetty*.

4. (1918) A I R 1918 Lah 198 (201) : 45 Ind Cas 563 : 1918 Pun Re No 79 : *Ratan Das v. Mt. Guran*.

(1884) 10 Cal 68 (72) : 13 Cal L R 53, *Modun Mohun Choudhry v. Ashad Ally Deparee*.

5. (1918) A I R 1918 Lah 198 (201) : 45 Ind Cas 563 : 1918 Pun Re No 79, *Ratan Das v. Mt. Guran*.

(1884) 10 Cal 68 (71, 72) 13 Cal L R 53, *Modun Mohun Choudhry v. Ashad Ally Deparee*.

C. (1912) 15 Ind Cas 240 (244) (All), *Ram Daur Rai v. Bhirgu Rai*.

[See also (1912) 15 Ind Cas 275 (275, 276) : 1912 Pun Re No, 94, *Nand Lal v. Goojar*.]

Note 28

— 1. (1931) A I R 1931 Oudh 69 (71) : 127 Ind Cas 252, *Humayun Qadar v. Suraya Begam*.

(1914) A I R 1914 Lah 139 (139) : 25 Ind Cas 616, *Mula Singh v. Budh Singh*.

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A mortgagee entitled to possession of the mortgaged property under the terms of his mortgage, cannot, during the subsistence of the mortgage, convert his possession, by assertion or unilateral act, into one adverse to the mortgagor.⁴ The reason is that his possession

(1926) 93 Ind Cas 934 (935) (Lah), *Jauahar v. Amar Chand*.

2. (1934) A I R 1934 Lah 902 (904) 16 Lah 12 : 154 Ind Cas 243, *Nizam Din Khan v. Rashid Ali Khan*.

3. (1892) 1892 All W N 51 (51), *Maula Balkhsh v. Tajammal Husain*.

4. (1862) 1862 Suth W R FB 87 (38) (FB), *Muddun Gopal Singh v. Lalla Hunooman Dobay* (So long as the relation of mortgagor and mortgagee exists between the parties to a suit, the law of limitation will not apply and possession of the mortgagee will not become adverse)

(1904) 32 Cal 296 (312) 32 Ind App 23 9 Cal W N 201 : 2 All L Jour 71 : 7 Bom L R 1 1 Cal L Jour 594 8 Sar 734 (P C), *Khwarajmal v. Diam* (As between mortgagor and mortgagee, neither exclusive pos-

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(1926) A I R 1926 Pat 512 (513) 97 Ind Cas 848 6 Pat 102, *Dinanath Rai v. Rama Rai*.

(1920) A I R 1920 Mad 834 (839) 52 Ind Cas 675, *Kunhunnai Panikkar v. Raman* (Person entering as simple kanomdar, subsequently taking invalid permanent kanom from an Ooralan, cannot make his possession adverse to the trust)

(1910) 5 Ind Cas 478 (479) (Mad), *Sangamma Naicker v. Ramaswamy Naicker*.

(1866) 1866 Pun Re No 58, *Chiragh Shah v. Ghusceta*.

(1925) A I R 1925 Oudh 182 (183) : 80 Ind Cas 582, *Ram Chhor Balsh v. Ram Surat*.

(1906) 16 Mad L Jour 5 (6), *Lalshmi Nachar v. Rama Chandra*.

(1932) A I R 1932 All 437 (439) 138 Ind Cas 866, *Arjun Singh v. Mahesha Nand*.

(1925) A I R 1925 All 417 (419) 86 Ind Cas 849, *Ram Prasad Singh v. Babu Lal*.

(1920) A I R 1920 Oudh 302 (303) 23 Oudh Cas 269 60 Ind Cas 404, *Tilak Chand v. Shambhu Singh*

(1923) A I R 1923 Lah 71 (72) 68 Ind Cas 883, *Zora v. Chandu*

(1926) A I R 1926 Oudh 491 (492) 92 Ind Cas 832, *Bajrang Bal v. Jt. Maharaja*

(1924) A I R 1924 Bom 521 (522) 83 Ind Cas 145, *Shuappa Malappa v. Atal Lumanna*

(1926) A I R 1926 Oudh 517 (518) 95 Ind Cas 849, *Niranhar Prasad v. Mt. Bechai*

(1866) 1 Agra 15 (16), *Ram Dial v. Shah Dakhhan*.

(1911) 10 Ind Cas 999 (1000) (All), *Gandharp Singh v. Hari Krishna*.

(1919) A I R 1919 Oudh 150 (151) 22 Oudh Cas 72 : 52 Ind Cas 159, *Mohammad Mohsin v. Mohammad Abid*.

(1929) A I R 1929 All 875 (876) 119 Ind Cas 111, *Mahomed Karim v. Mahomed Salim*.

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- (1911) 10 Ind Cas 339 (340) (Mad), *Santharan Moosad v. Othenan Navr.*
 (1882) 1882 Pun Re No. 49, *Teju Mal v. Zulfakar Shah.*
 (1874) 21 Buth W R 13 (14), *Jeechoo Sahoo v. Syud Musseecollah.*
 (1890) 14 Bom 279 (291), *Bhagwant Goind v. Kondi Mahadu.*
 (1907) 29 All 610 (617) : 1907 All W N 221 : 4 All L Jour 521, *Muzaffar Ali Khan v. Parbati.*
 (1864) 1861 Suth W R 69 (68), *Mt. Mohasha v. Mt. Khoondoo.* (Possession by mortgagee cannot be adverse to the heir of the deceased mortgagor.)
 (1920) A I R 1920 Cal 937 (938) : 62 Ind Cas 502, *Kali Mahmud Talukdar v. Dina Dandhu Dutt.* (Simple mortgagee getting into possession by sale—Sale set aside and mortgagee treated as mortgagee in possession—His possession is not adverse.)
 (1926) A I R 1926 Sind 145 (148) : 91 Ind Cas 87 : 20 Sind L R 277, *Sulleman v. Esso.*
 (1926) A I R 1926 Lah 519 (550) : 95 Ind Cas 9, *Juman Singh v. Ghanta.*
 (1908) 1909 All W N 1 (2) : 4 All L Jour 787 : 3 Mad L Tim 182, *Jhabbalal v. Chhajju Mal.*
 (1878) 1 All 655 (657, 658), *Ali Muhammad v. Lalla.*
 (1915) A I R 1915 All 203 (206) : 29 Ind Cas 403, *Panna Lal v. Rameshar Sahai.*
 (1916) A I R 1916 Oudh 318 (315) : 19 Oudh Cas 166 : 31 Ind Cas 745, *Jagat Pal Singh v. Harnam Singh.*
 (1916) A I R 1916 Mad 811 (815) : 31 Ind Cas 678, *Thottakura Gorindu v. Pepakayala Mallaya.* (The denial of the existence of the mortgage or assertion of a proprietary title to the mortgaged property would not give an adverse possession to the mortgagee.)
 (1887) 10 Mad 189 (191), *Mussad v. Collector of Malabar.* (Do.)
 (1923) A I R 1923 All 613 (613) : 74 Ind Cas 830, *Raghunath v. Jetto Singh.* (Do.)
 (1921) A I R 1921 Oudh 124 (125) : 63 Ind Cas 284 : 24 Oudh Cas 155, *Mahendra Bahadur Singh v. Chandrapal Singh.* (Do.)
 (1929) A I R 1929 Pat 17 (18) : 104 Ind Cas 644, *Tali Mahton v. Lakhraj*
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 (1929) A I R 1929 Lah 691 (692) : 126 Ind Cas 66, *Rahmat Allah v. Mt. Mubarak Bibi.* (Do.)
 (1925) A I R 1925 All 84 (35) : 80 Ind Cas 944, *Ram Ganesh Rai v. Rup Narain Rai.* (Do.)
 (1908) 1908 Pun Re No. 65 : 1908 Pun L R No. 90 : 1908 Pun W R No. 113, *Indar v. Asa Singh.* (Do.)
 (1912) 13 Ind Cas 852 (853) (Lah), *Lehna Singh v. Santa Singh.* (Do.)
 (1911) 11 Ind Cas 429 (430, 431) (Lah), *Jua Khan v. Lakshmi Chand.* (Do.)
 (1916) A I R 1918 Lah 197 (198) : 48 Ind Cas 447, *Ram Singh v. Basti.* (Do.)
 (1930) A I R 1930 Oudh 17 (20) : 118 Ind Cas 808, *Mt. Gujrat Kunuar v. Bhagnati Dm Singh.* (Do.)
 [See (1901) 3 Bom L R 97 (99), *Manohar v. Baltant.*]
 [But see (1923) A I R 1923 Lah 534 (535) : 77 Ind Cas 509, *Mohammad Ramzan v. Municipal Committee, Alipure.* (Observation obiter)]

is only a derivative one and not hostile to the mortgagor.⁵ Further, as seen in Note 18 *ante*, the possession must be referred to the title which he has as mortgagee and he cannot be permitted to discard his title as mortgagee and claim to be in wrongful possession.⁶ In *Khairajmal v. Daim*,⁷ their Lordships of the Privy Council observed as follows :

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"As between them (i.e., the mortgagor and the mortgagee), neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem."

It would follow from what has been stated above that the mere fact that the mortgage has been *discharged by payment* will not render the possession of the mortgagee adverse to the mortgagor from the date of discharge.^{7a} A contrary view has, however, been held in the undermentioned cases,^{7b} namely that the possession in such cases would become adverse to the mortgagor. It has also been held in some cases^{7c} that the question whether the possession of the mortgagee after the payment of the mortgage money, is or is not adverse to the mortgagor, is always a question of *animus* or intention

5 (1928) A I R 1928 All 726 (730) : 50 All 986 : 118 Ind Cas 177 (F B), *Sohan Lal v. Mohan Lal*.

(1905) 7 Bom L R 772 (789), *Mahomed v. Ezekiel*.

6. (1925) A I R 1925 All 183 (185) . 47 All 73 80 Ind Cas 935, *Bakha Singh v. Ram Narain Singh* (He cannot set up or acquire title by adverse possession so long as the right to redeem subsists and is not barred by limitation)

(1936) A I R 1936 Mad 308 (309, 310) . 161 Ind Cas 999, *Veethil Kelu v. Chakkara Chappan*.]

7 (1904) 32 Cal 296 (312) 32 Ind App 23 9 Cal W N 201 2 All L Jour 71 7 Bom L R 1 1 Cal L Jour 584 . 8 Sar 734 (F C)

7a (1910) 5 Ind Cas 664 (665) (All), *Nandan Pat Tewari v Radha Keshun Kalwar*

(1926) A I R 1926 All 186 (188) 89 Ind Cas 574, *Mt. Beti Bai v Tantiya Singh*

(1930) A I R 1930 Cal 15 (16) 56 Cal 1130 121 Ind Cas 407, *Harasit Golder v Jaladhar Biswas*

(1898) 20 All 115 (117) 1897 All W N 214, *Pokhpal Singh v. Bishan Singh*.

(1910) 7 Ind Cas 385 (386) 83 All 97, *Sudarshan Das v Ram Pershad*.

(1912) 18 Ind Cas 963 (964) 34 All 261, *Habibulla v Abdul Hamid*.

(1924) A I R 1924 All 522 (523) 83 Ind Cas 740, *Gobind Ram v Mt. Ram Koer*

(1865) 2 Mad H C R 382 (383), *Vanneri Purushottaman Nambudri v. Pattanattil Kunju Menayan*

7b (1925) A I R 1925 Lah 616 (616, 617) 88 Ind Cas 476, *Khushalla v Bishan Das*

(1926) A I R 1926 All 62 (63) 92 Ind Cas 414 48 All 145, *Mt Ram Koer v. Gobind Ram*.

7c (1930) A I R 1930 Cal 402 (404) 129 Ind Cas 414, *Keshab Lal Goswami v. Bhola Nath*. (34 All 261 18 Ind Cas 963, Followed)

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of the parties concerned. It is submitted that these last two views do not appear to be correct on principle. The fact of payment would not put an end to the mortgagor's right to redeem, and a suit for redemption can be brought within a period of sixty years under Article 148 of the Act. So long as the right to redeem subsists and is not barred by limitation, the relation of mortgagor and mortgagee subsists and the possession of the mortgagee must be referred to the title as mortgagee and cannot be considered adverse, unless he actually gives up the property and enters under a different status.^{7d}

Suppose now that the mortgagor *sells the equity of redemption* to the mortgagee, but the sale is found to be void or voidable. Does the possession of the mortgagee from the date of the sale become adverse to the mortgagor? It has been held in the undermentioned cases^{7e} that it would not, on the general principle that a mortgagee cannot, by asserting possession as owner, convert his possession as mortgagee into one as owner. The general trend of opinion is, on the other hand, that from the date of the sale the possession of the mortgagee would become adverse to the mortgagor.⁸ Various reasons

(1933) A I R 1933 Oudh 13 (14) : 140 Ind Cas 189, *Ram Baksh Singh v. Ganga Pal Singh*. (The facts that the mortgage money was paid by

(1926) A I R 1926 Cal 910 (912) : 91 Ind Cas 342, *Keshab Lal v. Bholanath*.

7d (1929) A I R 1929 All 305 (306) : 119 Ind Cas 568, *Jai Nandan Tewari v. Umrao Koeri*.

(1925) A I R 1925 All 133 (135) : 47 All 73 : 80 Ind Cas 935, *Bakha Singh v. Ram Narain Singh*.

7e. (1914) A I R 1914 Mad 489 (493) : 37 Mad 423 : 15 Ind Cas 343, *Ariyaputhira Padayachi v. Muthukumaraswami Padayachi*.

(1935) A I R 1935 Lah 924 (925) : 160 Ind Cas 557, *Nawab v. Lachman Singh*.

(1929) A I R 1929 Lah 80 (31) : 113 Ind Cas 540, *Din Muhammad v. Safdar Ali*.

(1931) A I R 1931 Lah 902 (904) : 16 Lah 12 : 154 Ind Cas 243, *Nizam Din Khan v. Rashid Ali Khan*.

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8. (1928) A I R 1928 All 726 (730) : 50 All 936 : 118 Ind Cas 177 (F B), *Sohan Lal v. Mohan Lal*.

(1928) A I R 1928 All 726 (730) : 50 All 936 : 118 Ind Cas 177 (F B), *Sohan Lal v. Mohan Lal*.
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(1925) A I R 1925 Mad 566 (567) : 87 Ind Cas 331, *Dawood Sahib v. Moideen Batcha Sahib*.

(1924) A I R 1924 Mad 720 (720) : 80 Ind Cas 561, *Aiyisa Bivi Ammal v. Kalandarsa Routhar*.

have been advanced in support of this view. One reason is that though the possession of the mortgagee must be referred to the title which he has, an *ouster* must be presumed from the date of the sale, and that consequently the possession of the mortgagee would be adverse to the mortgagor.⁹ A second reason is that since the parties could, by common consent, put an end to the mortgagee's estate, the sale would operate as such agreement to put an end to the mortgagee's estate as such, and that therefore, the mortgagor would at once be entitled to possession, with the consequence that the possession of the mortgagee thereafter would be adverse to the mortgagor.¹⁰ A third reason advanced is that where a change in the character of the possession is brought about by an agreement between the parties or with their expressed consent as distinguished from acquiescence, the possession will become adverse from that date.¹¹ The true reason would appear to be that the rule that possession

- (1921) A I R 1921 Mad 213 (215, 216) 63 Ind Cas 215, *Musigadu v. Gopala Reddi*,
 (1921) A I R 1921 Mad 82 (84) 44 Mad 253 : 62 Ind Cas 603, *Kandaswami Pillay v. Chinnabha*
 (1917) A I R 1917 All 212 (214) 40 Ind Cas 121 39 All 423, *Khedu Rai v. Sheoparsan Rai*
 (1921) A I R 1921 Oudh 124 (125) 24 Oudh Cas 155 63 Ind Cas 284, *Mahendra Bahadur Singh v. Chandrapal Singh*. (Mortgage with possession—Invalid sale of the property to the mortgagee—Latter's possession becomes adverse to mortgagor.)
 (1930) A I R 1930 Lah 71 (72) 120 Ind Cas 481, *Prem Das v. Sarbaland*.
 (1925) A I R 1925 Oudh 385 (386) 87 Ind Cas 188, *Sheonath v. Tulsu Pat Ram*.
 [See (1929) A I R 1929 Mad 16 (18) 109 Ind Cas 795, *Kandaswami Mudaliar v. Ponnuswamy Mudaliar*.
 (1934) A I R 1934 Pat 301 (302) 151 Ind Cas 55, *Santokhi Misser v. Suro Jha* (Relation of mortgagor and mortgagee ceasing by sale of the mortgaged property to the mortgagee.)]
 9. (1928) A I R 1928 All 726 (732) 50 All 986 118 Ind Cas 177 (F B), *Sohan Lal v. Mohan Lal* (Per Kendall J)
 10. (1928) A I R 1928 All 726 (731) 50 All 986 118 Ind Cas 177 (F B), *Sohan Lal v. Mohan Lal*. (Per Mukerji J.)
 11. (1928) A I R 1928 All 726 (734, 735) 50 All 986 : 118 Ind Cas 177 (F B), *Sohan Lal v. Mohan Lal*. (Per Sulaiman C J)
 (1926) A I R 1926 Oudh 145 (145) 90 Ind Cas 736, *Ibad Ali v. Duarka*. (Agreement to relinquish equity of redemption not evidenced by document—Still adverse possession against mortgagor starts from date of such agreement)
 (1922) A I R 1922 Oudh 183 (134) 25 Oudh Cas 83 63 Ind Cas 223, *Bashir Husain v. Chandrapal Singh*
 (1914) A I R 1914 Mad 578 (579) 16 Ind Cas 694 (696) 37 Mad 545, *Usman Khan v. Nagalla Dasanna*
 (1930) A I R 1930 Bom 135 (139) 53 Bom 676 122 Ind Cas 113, *Ahmed Bhauddin v. Babu Dey*
 (1917) A I R 1917 Low Bur 178 (178) 36 Ind Cas 959, *Abdul Hamid v. Darriah Bibi*.
 (1924) A I R 1924 Rang 200 (201) 82 Ind Cas 829, *Mg San Chem v. Ma Daung U*.
 (1882) 1882 All W N 84 (85), *Dhola v. Ajudhia Prasad*.
 (1921) A I R 1921 Mad 82 (84) 62 Ind Cas 603 44 Mad 253, *Kandaswami Pillay v. Chinnabha*.

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must be referred to the title which the possessor has and that the possessor cannot be permitted to set up any other title to the property, has no application where the mortgagor *admits* (by execution of the sale deed) that he has no title from that date. The rule above mentioned is really intended for the *benefit of the mortgagor* and can therefore be waived by him by admitting that he has no title, and that the title is in the mortgagee.

Where in a suit between the mortgagor and the mortgagee the Court passes a *decree* that the mortgage is satisfied and that the mortgagor is entitled to immediate possession, it is equivalent to a declaration that the relation between the parties, of mortgagor and mortgagee, has come to an end. There is no further right of suit for redemption. The possession of the mortgagee after the date of such decree is not referable to any lawful title, and will consequently be adverse.¹²

Where *A* executes a usufructuary mortgage in favour of *B* and subsequently thereto, enters into an *agreement with him to sell* the mortgaged property to him, the possession of the mortgagee thereafter is not adverse to the mortgagor.¹³ There is no admission in such a case as in the case of the execution of a sale deed, that the mortgagor has no title to the property from that date, and the general rule that a mortgagee cannot, by assertion, make his possession adverse to the mortgagor, holds good.

Where *A* executes a mortgage with possession in favour of *B* and subsequently sells the mortgaged property to *B*, but nevertheless the mortgagee holds the property only as a mortgagee, it has been held that his possession is not adverse to the mortgagor.¹⁴

Where a *third person* who has no right to the equity of redemption purports to sell it to the mortgagee thereof, it is clear that the relationship of mortgagor and mortgagee is not put an end to, and the mortgagee's possession cannot become adverse to the mortgagor.¹⁵ In *Mata Din v. Ahamad Ali*,¹⁶ *A*, a Muhammadan,

[See (1881-82) 6 Bom 674 (680) : 7 Ind Jur 96, *Gopal Sitaram v. Narhar Apaji*.]

12. (1914) A I R 1914 All 242 (245, 246) : 25 Ind Cas 611 (615), *Mt. Zaiunnissa v. Parichhat*. (Following 24 All 44.)

(1922) A I R 1922 Mad 407 (408) : 70 Ind Cas 33, *Omayyurugam Mutt v. Sivasoria Tharan*.

13. (1925) A I R 1925 Oudh 114 (115) : 28 Oudh Cas 100 : 62 Ind Cas 406, *Silla Sahai v. Dhum Singh*.

14. (1937) A I R 1937 Lah 897 (898) : 172 Ind Cas 449, *Mt. Dhapan v. Sri Ram*.

15. (1897) 21 Bom 502 (508). *Bank of India v. ...*

v. Nanhai.

Ali.

Khan v. Kala

Shah.

(1891) 14 Mad 33 (42), *Byari v. Puttanna*.

(1912) 14 Ind Cas 584 (585) : 15 Oudh Cas 89, *Amir Ali v. Narali*.

See also Note 5 Point (4) under Article 143 *infra* and the cases cited thereunder.

16. (1912) 13 Ind Cas 976 (978) : 15 Oudh Cas 49 : 34 All 213 : 39 Ind App 49 (P C)

mortgaged to *B* certain properties with possession in the year 1885 for a period of ten years. *A* died subsequently leaving a minor son *C* as his heir. *X*, as *de facto* guardian of *C*, sold the equity of redemption to *B*, the mortgagee, in the year 1889. It was held by the Privy Council that the sale was void and *B*'s possession was not adverse to *C* till 1895, the date of the expiry of the term of the mortgage. If their Lordships meant by this that the possession of the mortgagee became adverse from 1895, it is difficult to understand the reasoning behind the view, inasmuch as on general principles, the possession of a mortgagee as such cannot become adverse to the mortgagor so long as the relationship of mortgagor and mortgagee subsists between the parties. It is also difficult to understand how their Lordships treated the case under the twelve years' rule of limitation, the suit being one for redemption of a mortgage governed by Article 148 of the Limitation Act

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A was in possession of *B*'s property under an arrangement by which he was entitled to be in possession until certain moneys which he had disbursed on *B*'s account were paid back to him. Subsequently in settlement proceedings instituted by *B*, *A* set up adverse title to the property. It was held in the undermentioned case¹⁷ that from that date the possession of *A* became adverse to *B*

Where a mortgagee without right to possession enters into possession, his entry would constitute a dispossession of the mortgagor and therefore a suit by the latter against the former would be governed by Article 142.¹⁸ But when the possession of a mortgagee entitled to be in possession under the terms of the mortgage, becomes by reason of subsequent events, adverse to the mortgagor and the latter sues for possession, the suit would be governed by Article 144, as there is no dispossession or discontinuance of possession of the mortgagor in such a case.¹⁹

Where a mortgagee sets up adverse possession against a mortgagor, the onus is on the former to show when and how the possession became adverse.²⁰

29. Possession of mortgagee under invalid foreclosure proceedings.— See Note 6 to Article 148

30. Possession of mortgagee under mortgage providing that on default the mortgagee should be full owner.— See Note 7 to Article 148

17. (1911) 9 Ind Cas 391 (393) 14 Oudh Cas 95 33 All 125 33 Ind App 23 (P C), *Muhammad Bakar v Muhammad Bakar Ali Khan*.

18 See Note 2 ante.

19 See Note 2 ante.

20 (1926) A I R 1926 Oudh 517 (518) 95 Ind Cas 849, *Niranhar Prasad v. Mt Becha*

(1912) 17 Ind Cas 913 (913) (Low Bur), *Maung Chit Ton v Maung Aung Gyaw*

(1913) 22 Ind Cas 65 (67) 9 Nag L R 179, *Anjuman Islami v Hisamal*.

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31. Possession of mortgagee after purchase in contravention of Order 34 Rule 14 of the Civil Procedure Code.— See Note 8 to Article 148.

32. Possession of person entering under void mortgage.— See Note 60 *infra*.

33. Possession by the mortgagee, after redemption, of accessions to mortgaged property.— See Note 16 to Article 148.

34. Possession of co-mortgagee paying off other co-mortgagees.— Where a mortgage is indivisible and has been made in favour of a number of co-mortgagees, and one of them pays off the others and remains in possession of the whole property, his possession must be deemed to be only that of a mortgagee so far as the mortgagor is concerned and consequently is not adverse to the mortgagor. As the co-mortgagee pays off each of the other co-mortgagees, he takes their place only as mortgagee.¹

35. Possession of co-owners—General.— Since possession is never considered adverse so long as it can be referred to a lawful title, (see Note 18 *ante*) the possession of one co-owner, who is entitled as such co-owner to be in possession of the property, must be referred to that title only and cannot be considered adverse to the other co-owners.¹

Note 34

1. (1923) A I R 1923 Lah 366 (368) : 73 Ind Cas 475, *Shuja-ud-din Khan v. Sher Muhammad Khan*.

Note 35

1. (1904) 27 Mad 192 (197) : 13 Mad L Jour 341, *Ramanathan Chetty v. Murugappa Chetty*. (In case of more trustees than one, possession of one is possession of all and possession adverse against one is possession adverse against all.)

Ali v. Md. Ali.
1 Cas 603 (F B),

Rustam Khan v. Mt. Jani.

- (1927) A I R 1927 All 846 (848) : 105 Ind Cas 628, *Ganga Sahai v. Nihal Singh*.

(1878) 5 N W P H C R 122 (127), *Yusuf Ali Khan v. Chubbee Singh*.

(1883) 7 Bom 34 (38, 39), *Dadoba v. Krishna*.

(1924) A I R 1924 Bom 297 (298) : 74 Ind Cas 161, *Mohidin v. Ibrahim*.

(1898) 1898 Bom P J 293 (294), *Bapalal Keshilal v. Bapuji Chhotalal*.

(1936) A I R 1936 Cal 106 (109) : 161 Ind Cas 450, *Nirmal Chandra v. Mohitosh Das* (The rule with regard to exclusive possession of a co-sharer in joint properties, to the exclusion of other co-sharers, also applies to property which is held in common by persons in their capacity as shabaitis)

- (1904) 27 Mad 192 (197) : 13 Mad L Jour 341, *Ramanathan Chetty v. Murugappa Chetty*. (In case of more trustees than one, possession of one is possession of all and possession adverse against one is possession adverse against all.)

(1904) 27 Mad 192 (197) : 13 Mad L Jour 341, *Ramanathan Chetty v. Murugappa Chetty*. (In case of more trustees than one, possession of one is possession of all and possession adverse against one is possession adverse against all.)

- (1928) A I R 1928 Cal 574 (576) : 111 Ind Cas 19, *Ramchandra Saha v. Lakshmi Kanta*.

(1924) A I R 1924 Cal 356 (357) : 72 Ind Cas 33, *Joytun Bibi v. Solimuddin Choudidar* (Possession by manager of one of the co-owners is not adverse to the others)

- (1914) A I R 1914 Cal 283 (284, 285) : 21 Ind Cas 621, *Basanta Kumari Dasa v. Mohesh Chandra Shaha*.
- (1914) A I R 1914 Cal 362 (363) : 41 Cal 436 : 21 Ind Cas 861, *Israel v. Samset Rahman*.
- (1870) 14 Suth W R 228 (228), *Sookh Lal Bhoogwala v. Goolzar Bhoogwala*.
- (1931) A I R 1931 Lah 631 (632) : 135 Ind Cas 88, *Yara v. Jalal*.
- (1924) A I R 1924 Lah 155 (156) : 73 Ind Cas 665, *Hadayat Khan v. Shah-mand*.
- (1924) A I R 1924 Lah 293 (294) : 69 Ind Cas 671, *Muhammad Amin v. Karim Dad*.
- (1924) A I R 1924 Lah 479 (479) : 80 Ind Cas 519, *Jamna Bai v. Gonda Ram* (Possession of co-parcener (Hindu) who has been converted to another faith is that of a tenant-in-common and is not adverse to the other members of the family.)
- (1887) 11 Mad 116 (127), *Subramanyam v. Paramaswaram*. (Possession of one *uralan* is the possession of all)
- (1919) 36 Mad L Jour 12 (12) (Jour) (Critical Note on (1918) 42 Bom 529 : A I R 1918 Bom 233, *Himatlal Maganlal v. Bhikhabhai Amritlal*)
- (1913) 18 Ind Cas 358 (359) : 1913 Mad W N 381 (381), *Tajuddin Sahib v. Ali Ahmed*.
- (1938) A I R 1938 Nag 423 (431) : 179 Ind Cas 82, *Mt. Draupadi v. Vikram Krishna*.
- (1936) A I R 1936 Nag 282 (283) : 165 Ind Cas 934, *Krishna Bai v. Parwati Bai*.
- (1933) A I R 1933 Nag 274 (276) : 30 Nag L R 18 : 150 Ind Cas 679, *Mt. Jyibai v. Zabu*.
- (1927) A I R 1927 Nag 395 (397) : 102 Ind Cas 161, *Kisanachandra v. Ramlal*.
- (1925) A I R 1925 Nag 240 (242) : 83 Ind Cas 86, *Mt. Bhagat v. Bheosen*.
- (1923) A I R 1923 Nag 2 (4) : 68 Ind Cas 320, *Sakharam v. Deoba*.
- (1917) A I R 1917 Nag 211 (211) : 42 Ind Cas 291, *Sadhuram v. Ramadhin*.
- (1935) A I R 1935 Oudh 387 (391) : 155 Ind Cas 23, *Mt. Rajana v. Musahab Ali*.
- (1933) A I R 1933 Oudh 500 (501) : 149 Ind Cas 1172, *Brahma Singh v. Raghuraj Singh*.
- (1933) A I R 1933 Oudh 547 (550) : 146 Ind Cas 582 : 9 Luck 219, *Harbhan Dat v. Ladi Saran*.
- (1933) A I R 1933 Oudh 439 (447) : 8 Luck 602 : 146 Ind Cas 710, *Abdul Qayum v. Abdul Rahman*.
- (1930) A I R 1930 Oudh 200 (201, 202) : 114 Ind Cas 497, *Nur Ali v. Mt. Shahzadi*.
- (1930) A I R 1930 Oudh 177 (178) : 4 Luck 339 : 121 Ind Cas 892, *Alisher v. Wajid Ali*.
- (1929) A I R 1929 Oudh 257 (259) : 118 Ind Cas 87 : 5 Luck 31, *Gaya Din v. Gur Din*.
- (1929) A I R 1929 Oudh 284 (286) : 4 Luck 503 : 116 Ind Cas 195, *Sheo Raj v. Ajudhiya*.
- (1929) A I R 1929 Oudh 337 (339) : 115 Ind Cas 440, *Bashir Ahmed v. Parshotam*.
- (1929) A I R 1929 Oudh 402 (404) : 119 Ind Cas 866, *Mubmul Nisa v. Ali Hussain*.
- (1928) A I R 1928 Oudh 449 (460) : 112 Ind Cas 522, *Mahomed Jamil v. Mahomed Hafiz*.
- (1926) A I R 1926 Oudh 464 (466) : 96 Ind Cas 455 : 2 Luck 172, *Sidke-shuar v. Ganga Sagar*.
- (1926) A I R 1926 Oudh 258 (259, 260) : 92 Ind Cas 685 : 1 Luck 62, *Mahadeo Prasad v. Ram Phal*.
- (1925) A I R 1925 Oudh 510 (511) : 85 Ind Cas 387, *Ram Nidh v. Janhi*.
- (1925) A I R 1925 Oudh 241 (243) : 78 Ind Cas 282, *Abdul Shakur Khan v. Mohd. Ali Khan*.
- (1925) A I R 1925 Oudh 208 (209) : 80 Ind Cas 619, *Chhotey Lal v. Hanoo-man Singh*.
- (1924) A I R 1924 Oudh 266 (271) : 27 Oudh Cas 77 : 78 Ind Cas 895, *Indar-pal Singh v. Thakur Din Singh*.

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Note 35**

In *Corea v. Appuhamy*,² a case under the Ceylon Prescription Ordinance, 1871, where the question was whether the possession of one of the heirs of a deceased Christian, on the basis that he was sole heir, was adverse to the other heirs, their Lordships of the Privy Council observed as follows :

"Entering into possession and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have accrued for the benefit of his co-proprietors. The principle recognized by Wood, V. C.

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- (1917) A I R 1917 Oudh 179 (180) : 39 Ind Cas 493, *Lala Jagan v. Mathura Prasad*. (Among members of a joint Hindu family, separation in mess denotes conversion to tenancy-in-common only, and does not give rise to adverse possession unless disclaimer is proved.)
- (1925) A I R 1925 Pat 492 (493) 87 Ind Cas 736, *Kameshwar Naram Singh v. Janardhan Prasad*.
- (1929) A I R 1929 Rang 211 (213) : 7 Rang 161 : 118 Ind Cas 122, *Ma Fatima v. Monin Bibi*.
- (1925) A I R 1925 Rang 40 (40, 41) : 82 Ind Cas 821, *Ma San Hla Me v. Ma Tun Me*.
- (1919) A I R 1919 Low Bur 107 (108) : 52 Ind Cas 629 : 10 Low Bur Rul 45, *Hars Pru v. Ma Aung Kraw Zan*.
- (1916) A I R 1916 Low Bur 77 (78) : 32 Ind Cas 568, *Ma Nyein Me v. Ma May*.
- (1930) 128 Ind Cas 309 (310) (Lah), *Hanwant Ram v. Mughli*.
- (1928) 109 Ind Cas 864 (865) (Nag), *Fakubsha v. Kalusha*.
- (1929) 107 Ind Cas 211 (212) (Sind), *Mahomed Kassim v. Natho Dhano*.
- (1924) 79 Ind Cas 279 (279) (Lah), *Balmukund v. Wazir Chand*.
- (1923) 73 Ind Cas 748 (752) (Pesh), *Ghulam Haider Khan v. Sardar Ali-khan*.
- (1921) 64 Ind Cas 462 (464) (All), *Jagrani Misrani v. Mt. Sheo Dukari*.
- (1921) 64 Ind Cas 471 (472) (All), *Lachhmi Narain v. Nannha Mal*.
- (1918) 45 Ind Cas 217 (217) (Nag), *Raghoba v. Palhoba*.
- (1918) 21 Ind Cas 88 (89) (All), *Chunder Singh v. Tuindi*.

- (1910) 5 Ind Cas 171 (175) (Cal), *Dijendra Narain Roy v. Purnendu Narain Roy*.
- (1910) 5 Ind Cas 888 (890) : 1910 Pun Re. No. 29, *Suraya Jah v. Azim*.
- (1909) 4 Ind Cas 922 (922) (Lah), *Ude Ram v. Dujan*.
- (1909) 4 Ind Cas 965 (965) (Lah), *Atra v. Ram Kishen*.
- (1909) 4 Ind Cas 1004 (1004, 1005) (Lah), *Shams Shah v. Hussain Shah*.
- (1893) 3 Mad L Jour 100 (104), *Rajyalakshmi v. Suryanarayana*.
- (1907) 85 Cal 961 (968) : 12 Cal W N 127 . 6 Cal L Jour 785, *Jogendra Nath Rai v. Baldeo Das*.
- (1915) A I R 1915 Mad 447 (448) : 25 Ind Cas 573, *Muthukrishna Aiyangar v. Sankaranarayana Iyer*.
- (1927) A I R 1927 Lah 426 (427) : 102 Ind Cas 426, *Mehran v. Rahimi*.
[See (1903) 5 Rom L R 225 (227), *Rajaram v. Nanchand*. (Joint possession)]
- [But see (1903) 2 Low Bur Rul 184 (185), *Ma Ye v. Maung Hlaw*. (Where a co-heir remains in possession of a property for more than 12 years without any agreement between him and other co-heirs, he acquires right in the said property by adverse possession)]

2. (1914) A I R 1914 P C 213 (245) : 1912 A C 230 : 81 L J P O 151 (P C).

in *Thomas v. Thomas*³ holds good. 'Possession is never considered adverse if it can be referred to a lawful title'. His possession was, in law, the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

**Arts. 142 & 144
Note 35**

It follows that if there is *ouster* or something equivalent to it, then the possession of the co-owner will be adverse to the others.⁴

3. (1856) 25 L J Ch 159 (161) 2 Kay & J 79 4 W R (Eng) 135 110 R R 107 1 Jur (N S) 1160
- 4 (1866) 10 Moo Ind App 511 (535) 2 Sar 189 (P C), *Jowala Balsh v. Dharum Singh*
- (1937) A I R 1937 All 300 (303) · 169 Ind Cas 125, *Mt. Jaidēvi Kuari v. Dakshini Din*
- (1933) A I R 1933 All 173 (175) · 55 All 173 149 Ind Cas 819, *Ambika Prasad v. Sada Sheo Lal*.
- (1932) A I R 1932 All 99 (106) 54 All 210 199 Ind Cas 445, *Kanhaya Lal v. R H Skinner* (Lambardar is not a trustee for the co-sharers, and he can, therefore by withholding and appropriating to his own use the profits, acquire a title by adverse possession against them)
- (1929) A I R 1929 All 910 (912) 121 Ind Cas 102, *Abhey Ram v. Jhanda*
- (1922) A I R 1922 All 493 (481, 435) 65 Ind Cas 75, *Mustafakhan v. Mt. Dulari* (Usurpation of share by one consented to by others—Possession may be adverse)
- (1884) 1884 All W N 296 (296), *Hidayat-un-nissa v. Ahsan Ali*
- (1896) 1896 Bom P J 200, *Gitabai v. Dattuboua*.
- (1875) 1875 Bom P J 351, *Vidyashankar v. Ganpatram*.
- (1895) 22 Cal 954 (960), *Mahomed Akram Shaha v. Anarbi Choudhrani*.
- (1921) A I R 1921 Cal 647 (652) 67 Ind Cas 31, *Jagannath v. Chandni Bibi*
- (1919) A I R 1919 Cal 634 (636) 46 Cal 111 45 Ind Cas 783, *Purna Chandra Pal v. Baroda Prosanna Bhattacharya*
- (1918) A I R 1918 Cal 64 (64) 48 Ind Cas 692, *Chand Bibi v. Lal Mohamad*
- (1926) A I R 1926 Lah 644 (644) 94 Ind Cas 486, *Bishua v. Narain Singh*
- (1919) A I R 1919 Lah 114 (115) 50 Ind Cas 550, *Lakhera v. Mahji*
- (1937) A I R 1937 Lah 552 (556) I L R (1937) Lah 276 172 Ind Cas 37, *Zafar Husam v. Md. Ghias ud-din*
- (1914) A I R 1914 Lah 284 (285, 286) 1914 Pun Re No 45 22 Ind Cas 805, *Akbar v. Tabu*
- (1889) 1889 Pun Re No 104, *Sayyad Ali Nauaz v. Sayyad Abdul Hussain*.
- (1926) 94 Ind Cas 550 (551) 8 Lah L Jour 129 (131), *Karam Din v. Vehr Din*
- (1917) 82 Mad L Jour 39 (40) (Jour) (Critical Note on (1916) 39 Mad 879 A I R 1916 Mad 139, *Vellayutham Pillai v. Subbaraya Pillai*)
- (1936) A I R 1936 Nag 80 (85) 31 Nag L R Supp 191 162 Ind Cas 577, *Ratnasingh Chhatra v. Jaramsingh Chhatra*
- (1900) 13 C P L R 99 (100), *Sheodaya Singh v. Bhagvrat Singh*
- (1926) 16 Nag L Jour 68 (71), *Fakira v. Mt. Mameenabi*
- (1931) A I R 1931 Oudh 381 (382) 132 Ind Cas 772, *Sheoraj Narain v. Jagannath Prasad*
- (1927) 107 Ind Cas 866 (866) 5 Oudh W N 85 (86), *Ram Narain v. Mannu Lal*.
- (1929) A I R 1929 Pat 624 (626) 117 Ind Cas 636, *Ramlakhan Singh v. Chathu Sahai*
- (1927) A I R 1927 Pat 145 (163) 6 Pat 506 106 Ind Cas 620, *Ishuarsi Prasad v. Hari Prasad*
- (1916) A I R 1916 Pat 377 (360) · 34 Ind Cas 466, *Sinjhesicar Missir v. Rameshwar Jha*
- (1928) 107 Ind Cas 866 (866) (Oudh), *Ram Narain v. Mannulal*.

Arts. 142 & 144 If there is no ouster or exclusion, the possession of one is not adverse
Note 35 to the others.⁶

- (1910) 6 Ind Cas 695 (696) (All), *Ganpat Singh v. Mussai Singh*.
 (1909) 1 Ind Cas 322 (323). 33 Bom 817, *Amrita Ray v. Shridhar Narayan*.
 5. (1905) 27 All 348 (350) : 2 All L Jour 110n : 1905 All W N 15, *Raj Bahadur v. Bharat Singh*.
 (1905) 27 All 436 (439, 440) : 2 All L Jour 107 : 1905 All W N 36, *Mehinlal v. Badri Prashad*.
 (1888) 10 All 343 (346) : 1888 All W N 33, *Hashmat Begam v. Mashar Husain*.
 (1937) A I R 1937 All 124 (125) : 167 Ind Cas 371, *Ram Manohar v. Baboo Singh*.
 (1935) A I R 1935 All 774 (775) : 155 Ind Cas 824, *Baboo Singh v. Ram Manohar*.
 (1934) A I R 1934 All 193 (195) : 56 All 582 : 150 Ind Cas 81, *Fazal Hussain v. Muhammad Kazim*.
 (1933) A I R 1933 All 173 (174) : 55 All 173 : 149 Ind Cas 819, *Ambika Prasad v. Sada Sheo Lal*.
 (1932) A I R 1932 All 666 (667) : 139 Ind Cas 176 : 54 All 742, *Md. Mohit Ullah v. Bibi Halima Begam*.
 (1931) A I R 1931 All 551 (551, 552) : 132 Ind Cas 201, *Amjad Ali v. Asiruddin*.
 (1927) A I R 1927 All 410 (411) : 100 Ind Cas 650, *Mewa Ram v. Lal Sahai*.
 (1927) A I R 1927 All 454 (457) : 102 Ind Cas 66 : 49 All 763, *Harkesh Singh v. Mt. Hardevi*.
 (1927) A I R 1927 All 717 (719) : 101 Ind Cas 501 : 49 All 606, *Amar Singh v. Govind Ram*.
 (1926) A I R 1926 All 663 (664) : 97 Ind Cas 245 : 48 All 663, *Motichand v. Kalhanand Singh*.
 (1923) A I R 1923 All 291 (291) : 71 Ind Cas 640, *Hafiz Abdullah v. Ali*.
 (1923) A I R 1923 All 418 (419) : 71 Ind Cas 1033, *Jharap Rai v. Jamt Rai*.
 (1923) A I R 1923 All 447 (447, 448) : 71 Ind Cas 653, *Shakur v. Husain Bibi*.
 (1922) A I R 1922 All 899 (399) : 64 Ind Cas 24, *Deokinandan v. Zamir Husain Khan*.
 (1915) A I R 1915 All 30 (32) : 37 All 203 : 26 Ind Cas 922, *Ahmad Raza Khan v. Ram Lal*.
 (1915) A I R 1915 All 138 (139) : 28 Ind Cas 276, *Mallah v. Behari*.
 (1908) 5 All L Jour 511 (512, 513) : 1908 All W N 239, *Pardati v. Ram Prasad*.
 (1885) 1885 All W N 51 (52), *Karimdad Khan v. Fauzan Bibi*.
 (1905) 29 Bom 300 (304) : 7 Bom L R 252, *Gangadhar v. Parasharam*.
 (1901) 25 Bom 362 (365, 366) : 3 Bom L R 47, *Jagritandas v. Bai Amba*.
 (1886) 10 Bom 24 (27), *Nilo Ramchandra v. Govind Ballal*.
 (1883) 7 Bom 34 (38, 39), *Dadoba v. Krishna*.
 (1929) A I R 1929 Bom 141 (143) : 118 Ind Cas 785, *Bai Juti v. Bai Bibanboo*.
 (1921) A I R 1921 Bom 77 (78) : 64 Ind Cas 552, *Shulingappa v. Satyata Lazman*.
 (1880) 1880 Bom P J 811, *Atmaram Bajji v. Madhao Rao Bajpuji*.
 (1875) 12 Bom H C R 148 (153, 154), *Narayan Babaji v. Pandurang Ramchandra*.
 (1907) 35 Cal 961 (968) : 6 Cal L Jour 785 : 12 Cal W N 127, *Jogendra Nath Rai v. Baldev Das Maruani*.
 (1904) 31 Cal 970 (973) : 9 Cal W N 32, *Ujalbi Bibee v. Umakanta Karmokar*.
 (1891) 19 Cal 253 (264) : 19 Ind App 48 : 6 Sar 133 (P C), *Lachmeswar Singh v. Manowar Hussein*.
 (1936) A I R 1936 Cal 34 (36) : 160 Ind Cas 870, *Mahendra Narayan v. Dakshina Rangan*.
 (1936) A I R 1936 Cal 106 (109, 110) : 161 Ind Cas 450, *Nirmal Chandra v. Mohitosh Das*.

The question next arises as to the meaning of the word "ouster." Arts. 142 & 144
Note 35

- (1935) A I R 1935 Cal 641 (648) : 158 Ind Cas 656, *Indian Iron and Steel Co v. Bara Gopal Thakur*. (Transferees of a co shebait purporting to come in as co-shebait—Their possession is not such as to enable acquisition of title against co-shebait unless it amounts to an ouster of other co-shebait.)
- (1934) A I R 1934 Cal 856 (363) . 60 Cal 1406 149 Ind Cas 410, *Subodh Chandra v. Bhubalika Dasee*
- (1933) A I R 1933 Cal 253 (258) : 143 Ind Cas 402, *Suarnamoyee Das v. Prabodh Chandra*
- (1930) A I R 1930 Cal 180 (185) . 126 Ind Cas 36, *Panchanan Banerji v. Surendra Nath*.
- (1930) A I R 1930 Cal 341 (343) : 57 Cal 92 . 125 Ind Cas 665, *Akshay Kumar v. Bhajagobinda Shaha*.
- (1929) A I R 1929 Cal 250 (252) . 56 Cal 616 : 117 Ind Cas 593, *Biswanath v. Rabiya Khatun*.
- (1928) A I R 1928 Cal 396 (397) 107 Ind Cas 741, *Mahendra Nath Biswas v. Charu Chandra*
- (1927) A I R 1927 Cal 65 (68) 97 Ind Cas 539, *Ashutosh Roy v. Manomohan Roy*
- (1927) A I R 1927 Cal 177 (179) . 98 Ind Cas 43, *Debendra Lal Khan v. Pitambar Bera*
- (1926) A I R 1926 Cal 524 (525) 91 Ind Cas 610, *Rasul Ali v. Abdul Basid*.
- (1925) A I R 1925 Cal 469 (470) 82 Ind Cas 822, *Jinnatunnessa v. Abdul Halim Munshi*
- (1924) A I R 1924 Cal 45 (46) 50 Cal 487 74 Ind Cas 193, *Bhairabendra v. Rajendra Narain*
- (1924) A I R 1924 Cal 1016 (1046, 1047) 82 Ind Cas 392, *Hasim Ali v. Abjal Khan*.
- (1923) A I R 1923 Cal 18 (21) : 72 Ind Cas 680, *Kailash Chandra v. Bejoy Chandra*.
- (1923) A I R 1923 Cal 310 (310) . 67 Ind Cas 300, *Hemengini Das v. Sital Mandal* (If members of a joint family are separate only in mess and not in estate, there can be no adverse possession amongst them.)
- (1922) A I R 1922 Cal 8 (9) . 65 Ind Cas 8, *Joy Narain Sen Ukil v. Srihanta Roy*
- (1922) A I R 1922 Cal 54 (55) 68 Ind Cas 200, *Jogendra Nath v. Rajendra Nath*
- (1920) A I R 1920 Cal 473 (473) . 47 Cal 274 . 56 Ind Cas 141, *Govinda Chandra v. Dina Nath*
- (1920) A I R 1920 Cal 610 (612) . 47 Cal 182 . 51 Ind Cas 976, *Debendra Narayan v. Narendra Narayan*
- (1918) A I R 1918 Cal 68 (69) 51 Ind Cas 123, *Chintamani Pramanik v. Hriday Nath Kamla*.
- (1918) A I R 1918 Cal 501 (502) 44 Ind Cas 216, *Ahamuddin Tamjuddin v. Amiruddin*.
- (1916) A I R 1916 Cal 99 (100) 35 Ind Cas 72, *Tomejudd v. Mulai Chowkidar*
- (1915) A I R 1915 Cal 357 (360) 27 Ind Cas 465, *Abdul Rahman v. Promode Behary*
- (1915) A I R 1915 Cal 534 (535, 536) 26 Ind Cas 789, *Surja Bibi v. Tarap Mondal*
- (1915) A I R 1915 Cal 610 (612) 27 Ind Cas 1, *Bibi Bakhtun v. Ahmad Ishaqe*
- (1914) A I R 1914 Cal 535 (535) . 23 Ind Cas 562, *Jayneshwar v. Satish Chandra*
- (1875) 25 Suth W R 53 (54), *Shurfunissa Bibee Choudhram v. Kylash Chunder Gungopadhy*
- (1873) 20 Suth W R 270 (270), *Dmonath Rana v. Rukeebunnissa Bilee*.
- (1872) 18 Suth W R 198 (198), *Bissessuree Dossee v. Kallee Coomar Roy*.
- (1872) 17 Suth W R 74 (76), *Baboo Jahanchy Deo Narain Singh v. Baboo Umbica Pershad Narain Singh*

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- (1938) 67 Cal L Jour 188 (193), *Syed Mahomed Maleeh v. Shasi Moulv Nag.*
 (1899) 4 Cal L Jour 254 (255), *Amba Debya v. Jnanoda Sundari.*
 (1877) 1 Cal L R 364 (364, 365), *Sheikh Asud Ali Khan v. Sheikh Akbar Ali Khan.*
 (1936) A I R 1936 Cal 106 (110): 40 Cal W N 777 (786) : 161 Ind Cas 450, *Nirmal Chandra v. Mobitosh Das.*
 (1920) 24 Cal W N 1057 (1062), *Balaram Guria v. Shyama Charan Mandal.*
 (1899) 3 Cal W N 774 (776), *Baroda Sundari Deby v. Annoda Sundari.*
 (1937) A I R 1937 Lah 430 (431, 432) : 173 Ind Cas 327, *Chittar v. Ude Singh.*
 (1935) A I R 1935 Lah 91 (91, 92): 157 Ind Cas 1024, *Bal Muland v. Madan Gopal.*
 (1935) A I R 1935 Lah 441 (442), *Amru v. Santa.*
 (1933) A I R 1933 Lah 258 (259) : 146 Ind Cas 210, *Nandlal v. Mt. Karam Bibi.*
 (1933) A I R 1933 Lah 763 (763) : 148 Ind Cas 1112, *Mam Raj v. Chotu.*
 (1933) A I R 1933 Lah 784 (786) : 14 Lah 794 : 148 Ind Cas 1143, *Mt. Ghulam Bibi v. Mt. Saricar Bibi.*
 (1932) A I R 1932 Lah 143 (143, 144) : 135 Ind Cas 686, *Anant Ram v. Kishore Chand.*
 (1930) A I R 1930 Lah 220 (220) : 117 Ind Cas 904, *Mt. Mansa Devi v. Sansaru.*
 (1929) A I R 1929 Lah 549 (550) : 117 Ind Cas 803 : 11 Lah 29, *Jano v. Narsingh Das.*
 (1927) A I R 1927 Lah 426 (427) : 102 Ind Cas 426, *Mehran v. Rahimi.*
 (1927) A I R 1927 Lah 522 (524) : 102 Ind Cas 476, *Maulu v. Beli Ram.*
 (1927) A I R 1927 Lah 886 (887) : 106 Ind Cas 488, *Jam Budha v. Dasu Ram.*
 (1920) A I R 1920 Lah 106 (107) : 56 Ind Cas 169, *Balak Ram v. Kaura.*
 (1919) A I R 1919 Lah 133 (134) : 50 Ind Cas 762, *Chanani Mal v. Mela Ram.*
 (1919) A I R 1919 Lah 271 (271) : 50 Ind Cas 746, *Mangal Singh v. Shan-lani.*
 (1916) A I R 1916 Lah 43 (45) : 35 Ind Cas 549 : 1916 Pun Re. No. 57,

- appa.
 (1936) A I R 1936 Mad 654 (655) : 162 Ind Cas 771, *Sundararaja v. Raghava Reddi.*
 (1935) A I R 1935 Mad 137 (138) : 154 Ind Cas 720, *Mangammal v. Rangappa Naicker.*
 (1931) A I R 1931 Mad 22 (23) : 123 Ind Cas 454, *Thiagaraya Pillai v. Appaiyo Pillai.*
 (1928) A I R 1928 Mad 652 (654) : 109 Ind Cas 553, *Venkatachalam Chetty v. Subbata Subba*
Lumarappa
Murajalli

- (1916) A I R 1916 Mad 1097 (1098) . 30 Ind Cas 586, *Hidayat Ali Khan v. Khadar Khan Sahib*.
- (1915) A I R 1915 Mad 121 (122) : 26 Ind Cas 316, *Ponnuswamy Iyer v. Permaye*.
- (1914) A I R 1914 Mad 713 (713, 714) . 24 Ind Cas 436, *Giri Appayya v. Giri Krishnamma*.
- (1927) 1927 Mad W N 690 (697), *Arogaiswami v. Prahesi Annmal*.
- (1933) A I R 1933 Nag 69 (90) 173 Ind Cas 103, *Ramji v. Madhi*.
- (1917) A I R 1917 Nag 211 (211) 42 Ind Cas 291, *Sadhuram v. Ramadhin*.
- (1915) A I R 1915 Nag 125 (128) 11 Nag L R 164 . 31 Ind Cas 464, *Dina v. Bishambar Singh*.
- (1933) A I R 1933 Oudh 70 (72) : 141 Ind Cas 246, *Raghunandan v. Sheo Prasad*.
- (1932) A I R 1932 Ouhh 144 (145) . 136 Ind Cas 702, *Badri Misir v. Shankar Misir*.
- (1930) A I R 1930 Oudh 510 (515) 6 Luck 106 180 Ind Cas 65, *Ejaz Ali Kidwai v. Court of Wards, Dalarampur Estate*.
- (1928) A I R 1928 Oudh 449 (460) 112 Ind Cas 522, *Shah Mohammad Jamil Ata v. Mohammad Hafiz Ata*.
- (1926) A I R 1926 Oudh 258 (259, 260) 92 Ind Cas 685 . 1 Luck 62, *Mahadeo Prashad v. Ram Phal* (A co-sharer has a right to repair the whole of the house, and, if he does so, his act cannot be considered to be an act of such an hostile character that it may be considered as equivalent to a denial on his part of the title of the other co-owner or co-owners)
- (1920) A I R 1920 Oudh 805 (306) 95 Ind Cas 985, *Ram Manorath v. Sant*.
- (1917) A I R 1917 Oudh 179 (180) . 39 Ind Cas 498, *Lala Jagan v. Mathura Prasad*.
- (1916) A I R 1916 Oudh 202 (203) . 36 Ind Cas 743, *Asghar Husain v. Akbar Husain*.
- (1937) A I R 1937 Pat 56 (58) 164 Ind Cas 851, *Bajjnath Sahu v. Jaimangal Prasad*.
- (1936) A I R 1936 Pat 66 (68) 160 I C. 1054, *Moti Singh v. Deoki Singh*.
- (1934) A I R 1934 Pat 485 (488) 154 Ind Cas 1032, *Mt Dharichhnaikuar v. Ramyad Kuar* (Held principle did not apply in the particular circumstances of the case)
- (1929) A I R 1929 Pat 590 (591) 117 Ind Cas 644, *Jageyanand Pande v. Gujananda Pande*
- (1929) A I R 1929 Pat 624 (625) 117 Ind Cas 636, *Ramlakhan v. Chathu Sahu*
- (1926) A I R 1926 Pat 112 (116) 89 Ind Cas 918, *Tilakdhari Lal v. Abdul Wahabkhan*
- (1919) A I R 1919 Pat 537 (538) . 51 Ind Cas 77, *Lachmi Sahu v. Radha v. Kalka Singh*
- Ram Nath*
asul Ali v. Nainuddin
- (1910) 5 Ind Cas 898 (899) 1910 Pun Re No 20, *Jaimal Singh v. Gurmukh Singh*
- (1909) 4 Ind Cas 293 (299) 5 Low Bur Rul 112 *Ma Le v. Ma Hmyin*
- (1909) 2 Ind Cas 15 (18) 5 Nag L R 41, *Daud Khan v. Gorinda*
- (1909) 1 Ind Cas 252 (253) (Cal), *Narayan Chandra v. Dasant Kumari*.
(The mere fact that the plaintiffs are unable to show any overt act of ownership within 12 years before suit does not amount to a discontinuance of possession.)

**Arts. 142 & 144
Note 35**

Actual driving out of a co-owner will, no doubt, clearly be an ouster,⁶ but such physical eviction is not *necessary* to constitute ouster.⁷ It is conceived that in order to constitute ouster, there should be a refusal, express or implied, by the co-owner in possession, to allow the other co-owners to participate in the enjoyment of the property.⁸ Where the co-owner in possession denies *to the knowledge* of the other co-owners their title to the property, it may be taken that he impliedly refuses to allow the latter to participate in the enjoyment of the property. Hence, the test to see if there is an "ouster" is to see if the co-owner in possession has openly and unequivocally and to the *knowledge* of the other co-owners, denied their title to the property.⁹ In some decisions,¹⁰ however, it has been held that a

(1909) 1 Ind Cas 322 (323) 33 Bom 317, *Amrita Ravji v. Shrivdhar Narayan*.

[See (1930) A I R 1930 All 125 (126) · 122 Ind Cas 893, *Har Nath v. Mt. Phool Koer*.

(1899) 23 Bom 710 (714) : 1 Bom L R 203, *Mahamad Dasu v. Amanji Dasu*.

(1932) A I R 1932 Cal 634 (638) : 141 Ind Cas 320, *Galstaun v. Profulla Kumar*.]

6. (1920) A I R 1920 Cal 610 (612) : 47 Cal 182 : 51 Ind Cas 976, *Debendra Narayan v. Narendra Narayan*.

7. (1928) A I R 1928 Cal 216 (217) : 109 Ind Cas 747 : 55 Cal 396, *Chandra Kishore v. Bissessar Pal*.

(1921) A I R 1921 Cal 647 (652) . 67 Ind Cas 31, *Jagannath v Chandni Bibi*. (Ouster, what constitutes — Violent or intimidating expulsion or repulsion not necessary.)

(1926) A I R 1926 Cal 891 (892) : 94 Ind Cas 38, *Sabitra Dasu v. Nadir Chand (Do.)*

(1915) A I R 1915 Cal 357 (360) : 27 Ind Cas 465, *Loknath Singh v. Daleshwar Prosad*. (Do.)

(1917) A I R 1917 Cal 345 (348) : 35 Ind Cas 36, *Jatindra Nath v. Sabidan-nessa Khatun*.

8. See (1927) A I R 1927 All 454 (457) : 49 All 763 : 102 Ind Cas 66, *Hurkesh Singh v. Mt. Hardevi*.

9. (1923) A I R 1923 All 291 (291) · 71 Ind Cas 640, *Hafiz Abdullah v. Alli*.

(1936) A I R 1936 Cal 106 (110) : 161 Ind Cas 450, *Nirmal Chandra v. Mohitosh Das*.

(1935) A I R 1935 Cal 195 (197) : 62 Cal 305 . 155 Ind Cas 987, *Krishna Chandra v. Purna Chandra*.

(1922) AIR 1922 Cal 51 (55) 68 I.C. 200, *Jogendra Nath v. Rajendra Nath*.

(1921) A I R 1921 Cal 647 (651) · 67 Ind Cas 31, *Jagannath v. Chandni Bibi*.

(1927) A I R 1927 Lah 790 (791) : 100 Ind Cas 145, *Mt. Allah Jawai v. Md. Baksh*.

(1924) A I R 1924 Oudh 266 (272) : 27 Oudh Cas 77 : 78 Ind Cas 895, *Inderpal Singh v. Thakur Din Singh*.

(1936) A I R 1936 Pesh 24 (25) · 160 I. C. 952, *Jang Bahadur v. Abdul Nur*.

(1935) A I R 1935 Pesh 97 (98) : 157 Ind Cas 219, *Mahomed Husain Khan v. Ram Bakha*

(1919) A I R 1919 Low Bur 107 (108) . 52 Ind Cas 629 : 10 Low Bur Rul 45, *Harj Pru v. Mt. Jang Kraw Zan*.

— sul.

v. *Bihar Lal*.

Sheikh Isuf.

Vand Singh v. Natha.

[See also (1902) 5 Oudh Cas 6 (9), *Jagdamba Baksh v. Sitta Baksh*.]

10. (1922) A I R 1922 Bom 156 (156) · 77 Ind Cas 521, *Kesho Naram v. Ramchandra Ganesh*

bare denial of the title of the other co-owners, though made to their knowledge, does not amount to ouster and does not set time running against them. It is submitted that the view is not correct.

The conduct relied upon to prove adverse possession by a co-owner against other co-owners must be unequivocal and inconsistent with his character as co-owner.¹¹ Evidence which is sufficient to establish adverse possession by a stranger may be totally insufficient to prove adverse possession by one co-owner against other co-owners.¹²

It will be clear from what has been stated above that mere uninterrupted possession on the part of one co-owner is not adverse to the other co-owners.¹³ In other words, mere non-participation in the profits of the property by one co-owner and exclusive possession by the other will not be sufficient to constitute adverse possession

**Arts. 142 & 144
Note 35**

- (1922) A I R 1922 Cal 8 (10) 65 Ind Cas 8, *Joy Naran v. Srikanta Roy*.
 (1931) A I R 1931 Lah 439 (441) 131 Ind Cas 105, *Sathun v. Malku*
 (1929) A I R 1929 Lah 519 (519) 120 Ind Cas 273, *Indar Singh v. Chamela*
- 11 (1921) A I R 1921 Cal 647 (652) 67 Ind Cas 81, *Jagannath v. Chandni Bibi*.
 (1920) A I R 1920 Cal 610 (612) 47 Cal 182 51 Ind Cas 976, *Debendra Narayan v. Narendra Narayan*
 (1915) A I R 1915 Cal 534 (535, 536) 26 Ind Cas 788, *Surja Bibi v. Tarap Mondal*.
 (1935) A I R 1935 Lah 63 (64) 152 Ind Cas 821, *Baksh Shah v. Gulam Ali Shah*.
 (1928) 55 Mad L Jour 223 (227), *Venkatachallam Chettiar v. Annapurni Ammal*
 (1928) A I R 1928 Oudh 449 (460) 112 Ind Cas 522, *Mad Jamil Ata v. Md. Hafiz Ata*
 (1927) A I R 1927 Oudh 6 (7) 98 Ind Cas 80, *Mt. Sughra Begam v. Nurali*
 (1938) A I R 1938 Sind 132 (139) 176 Ind Cas 549, *Takulram Tackchand v. Mt. Mural*
 (1929) A I R 1929 Sind 212 (215) 23 Sind L R 461 118 Ind Cas 207, *Abdul Rahman v. Haji Mahomed Idris*
 (1921) A I R 1921 Sind 177 (180) 16 Sind L R 25 60 Ind Cas 118, *Mt. Bhagbhari v. Mt. Khatun*
 (1913) 18 Ind Cas 358 (360) (Mad), *Tajuddin v. Ali Ahmad*
 (1910) 5 Ind Cas 840 (841) (Lah), *Kirpa v. Juaa*.
- 12 (1921) A I R 1921 Cal 647 (652) 67 Ind Cas 81, *Jagannath v. Mt. Chandni Bibi* (Evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title)
 (1924) A I R 1924 Oudh 266 (272) 78 Ind Cas 895 27 Oudh Cas 77, *Indar-pal v. Thakur Din*
13. (1918) A I R 1918 P C 277 (279) (P C), *Muttunayagam v. Margaret Briso* (A I R 1914 P C 243 and (1855) 2 Kay & J 79, Followed)
 (1928) A I R 1928 Lah 720 (735) 109 Ind Cas 26, *Budhu Ram v. Uttamchand*
 (1915) A I R 1915 All 133 (139) 28 Ind Cas 276, *Mallah v. Behari*.
 (1936) A I R 1936 Cal 106 (110, 111) 161 Ind Cas 450, *Nirmal Chandra v. Mohitosh Das*
 (1931) A I R 1931 Lah 339 (341) 132 Ind Cas 177 12 Lah 101, *Narsingh Das v. Gokul Chand*
 (1920) 5 Lah L Jour 17 (18), *Mangal Singh v. Mathan Singh*
 (1927) A I R 1927 Mad 111 (112) 99 Ind Cas 158, *Govindasami v. Kothandapani*.
 (1925) A I R 1925 Nag 145 (146) 62 Ind Cas 432, *Kuterjee v. Rama*

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by the latter.¹⁴ There would, in such cases, be an occupation which would not be inconsistent with the other co-owners' possession.¹⁵ "It is important to bear in mind," observed their Lordships of the Privy Council in *Hardit Singh v. Gurmukh Singh*,¹⁶ "certain facts with regard to the possession of joint property which distinguish it from property separately held. In the former case the phrase 'exclusive possession' has an equivocal meaning; in the latter, it has not. If by exclusive possession of a joint estate is meant that one member of a joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole occupation of such property without more must be referred to the lawful title possessed by the joint holder to use the joint estate and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members. If possession may be either lawful or unlawful, in the absence of evidence it must be presumed to be the former."

An "ouster" may, in a proper case, be presumed where one co-owner has been in sole enjoyment of the property for a long

(1925) A I R 1925 Oudh 494 (495) : 86 Ind Cas 321, *Jagadamba Singh v. Asmat Ullah Khan*.

(1917) A I R 1917 Pat 320 (321) : 39 Ind Cas 579, *Mutsaddi v. Habib Man*.

(1930) 125 Ind Cas 739 (739) (Cal), *Kuda Koch v. Madan Gopal*.

(1911) 12 Ind Cas 427 (428) (Lah), *Govind Sahai v. Thakardas*.

(1921) 60 Ind Cas 293 (301) (Cal), *Balaram Guria v. Shyama Charan Mondal*.

14. (1924) A I R 1924 All 719 (720) : 79 Ind Cas 533, *Lachman Pande v. Tribeni Sahu*. (Adverse possession—Mere non-payment of profits to a co-sharer by *lambardar* is not ouster.)

(1901) 24 Mad 441 (443), *Sellam v. Chinnammal*.

(1897) 21 Mad 153 (159) : 8 Mad L Jour 92, *Ittappan v. Manavikrama*.

(1926) 51 Mad L Jour 72 (N R C.)

(1936) A I R 1936 Nag 282 (283) : 165 Ind Cas 931 : I L R (1937) Nag 212, *Krishnabai v. Parwatibai*.

(1887) 2 C P L R 171 (171), *Sheoba v. Simaria*.

(1929) A I R 1929 Oudh 402 (404) : 119 Ind Cas 866, *Mubmulnissa v. Ali Hussain*.

(1924) A I R 1924 Oudh 266 (271) : 27 Oudh Cas 77 : 78 Ind Cas 895, *Inderpal Singh v. Thakur Din Singh*.

(1936) A I R 1936 Pat 186 (139) : 161 Ind Cas 331, *Mt. Zainab v. Md. Ayub*.

(1926) A I R 1926 Pat 112 (116) : 89 Ind Cas 913, *Tilaladhari Lal v. Abdul Wahab Khan*.

(1923) A I R 1923 Pat 183 (184) : 67 Ind Cas 795, *Kuldip Singh v. Ram Setak Singh*.

(1934) A I R 1934 Pesh 7 (8) : 148 Ind Cas 926, *Mt. Yakut v. Inayatulla*.

Irki.

Bashir Ahmed.

Yakub Bakhs.

v. Ganga Bakhs.

in v. Binda.

15 (1918) A I R 1918 P C 339 (343), *W P. Tamel v. H. A. Anokamy*. (Unsuccessful attempts to assert title are not enough.)

16. (1918) A I R 1918 P C 1 (1, 2) : 1918 P R No. 64 : 47 Ind Cas 626 (P C).

time.¹⁷ In *Varada Pillai v. Jeevarathnammal*,¹⁸ their Lordships of the Privy Council referred with approval to *Culley v. Doe d. John Taylerson*,¹⁹ where it was held that where the claimant, tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster. In *Corea v. Appuhamy*,²⁰ it was contended that the Court might presume from the long continued possession of one co-owner, an ouster of others. Their Lordships observed. "No doubt in former times, before the Statute of William IV, when the justice of the case seemed to require it, juries were sometimes directed that they might presume an ouster." Their Lordships did not, however, consider it necessary to decide the question.

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17. (1924) A I R 1924 All 920 (921) : 79 Ind Cas 951, *Basu v. Mt. Nanhi*.
- (1923) A I R 1923 All 447 (448) 71 Ind Cas 653, *Shakur v. Hussain Bibi*.
- (1934) A I R 1934 Bom 273 (275) : 154 Ind Cas 824 58 Bom 410, *Anant Ganpati v. Vishnu Rambhau*.
- (1922) A I R 1922 Bom 150 (151) 46 Bom 213 : 64 Ind Cas 205, *Chand Bhai v. Hasanbhai*.
- (1921) A I R 1921 Bom 77 (78) 64 Ind Cas 552, *Shivalingappa Sativrappa v. Satyara Lazman*.
- (1903) 5 Bom L R 742 (744, 745), *Bandacharya v. Srinivasacharya*.
- (1936) A I R 1936 Cal 195 (198) 162 Ind Cas 697, *Chittagong Cotton Mills v. Amar Krishna*.
- (1928) A I R 1928 Cal 396 (397) : 107 Ind Cas 741, *Mahendra Nath v. Charu Chandra*.
- (1925) A I R 1925 Cal 469 (470) 82 Ind Cas 822, *Jinnatunnesa v. Abdul Halim*.
- (1925) A I R 1925 Cal 1221 (1223) : 87 Ind Cas 336, *Hangeswar Kundu v. Surjya Naram*.
- (1922) A I R 1922 Cal 54 (55) 68 Ind Cas 200, *Jogendra Nath v. Rajendra Nath*.
- (1918) A I R 1918 Cal 501 (502) 44 Ind Cas 216, *Ahamuddin Tamjuddin v. Amuruddin*.
- (1936) A I R 1936 Cal 106 (110) : 40 Cal W N 777 (787) : 161 Ind Cas 450, *Nirmal Chandra v. Mohitosh Das*.
- (1937) A I R 1937 Lah 890 (892) : 175 Ind Cas 605 : I L R (1938) Lah 367, *Amar Singh v. Shiv Datt Kaur*.
- (1917) A I R 1917 Lah 60 (63) 38 Ind Cas 120, *Gullu v. Khuda Baksh Khan*.
- (1897) 21 Mad 153 (159) 8 Mad L Jour 92, *Ittappan v. Manatikrama*.
- (1927) A I R 1927 Mad 170 (171) 98 Ind Cas 278, *Mariammal v. Augustine Roy*.
- (1933) A I R 1933 Nag 340 (344) 29 Nag L R 350 149 Ind Cas 622, *Mt. Mohankuar v. Bhagatram*.
- (1929) A I R 1929 Pat 624 (626) 117 Ind Cas 636, *Ramlakhan Singh v. Chathu Sahu*.
- (1920) A I R 1920 Pat 260 (262) 53 Ind Cas 731, *Parma Pande v. Ram Sarup Pande*.
- (1912) 17 Ind Cas 523 (524) (All), *Deokinandan v. Bindeswari*.
- (1912) 16 Ind Cas 342 (343) (All), *Muhammad Ishaq v. Nathu*.
- (1911) 10 Ind Cas 554 (556) 5 Sind L R 49, *Isudmal v. Ali*.
- 18 (1919) A I R 1919 P C 44 (47) : 43 Mad 244 : 46 Ind App 255 53 Ind Cas 901 (P C).
19. (1840) 9 L J Q B (N S) 288 (292) : 11 A & T 1008 : 3 P & D 539 52 R R 566.
20. (1914) A I R 1914 P C 243 (246) 1912 A C 130 61 L J P C 151 (P C).

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As already stated, in order to constitute ouster, the denial of title must be to the knowledge of the other co-owner.²¹ Such knowledge need not, however, be proved by direct evidence but may be inferred from the circumstances of the case.²²

A mere demand for partition by one co-owner and a refusal of such demand by the co-owner in possession will not amount to

21. (1937) A I R 1937 All 696 (698, 699) : 171 Ind Cas 910, *Kishen Prasad v. Mt. Shubratana*.
- (1934) A I R 1934 All 193 (195) : 150 Ind Cas 81 : 56 All 582, *Fazal Husain v. Mahomed Kazim*.
- (1923) A I R 1923 All 291 (291) : 71 Ind Cas 610, *Hafiz Abdullah v. Alli*.
(The possession of the mortgagee, under a mortgage by two of the co-sharers does not amount to an ouster of the third and would not amount to adverse possession of the two co-sharers unless the third has knowledge of the same)
- (1923) A I R 1923 All 447 (447) : 71 Ind Cas 653, *Shakur v. Husaini Bibi*.
- (1929) A I R 1929 Bom 823 (326) : 119 Ind Cas 779, *Malhar Vaman v. Vinayak Ravji*.
- (1930) A I R 1930 Cal 34 (36) : 160 Ind Cas 870, *Mahendra Narayan v. Dakshina Ranjan*.
- (1933) A I R 1933 Cal 222 (232) : 143 Ind Cas 179, *Nandalal v. Pramatha Nath*.
- (1930) A I R 1930 Cal 466 (468) : 128 Ind Cas 103, *Abdul Wahab v. Mohun Bashi Saha*.
- (1922) A I R 1922 Cal 54 (55, 56) : 68 Ind Cas 200, *Jogendra Nath v. Rajendra Nath*.
- (1921) A I R 1921 Cal 647 (652) : 67 Ind Cas 31, *Jagannath Marwari v. Mt. Chandni Bibi*.
- (1916) A I R 1918 Cal 425 (426) : 38 Ind Cas 187, *Kelabdi Sheikh v. Tola Bibi*.
- (1915) A I R 1915 Cal 534 (534) : 27 Ind Cas 420, *Surja Bibi v. Tarap Mondal*.
- (1934) A I R 1934 Lah 456 (456) : 15 Lah 907 : 154 Ind Cas 983, *Bel Ram v. Munshi*.
- (1932) A I R 1932 Lah 143 (144) : 135 Ind Cas 686, *Anant Ram v. Kishore Chand*.
- (1930) A I R 1930 Lah 251 (252) : 122 Ind Cas 105, *Ghulam Muhammad v. Mt. Begam*.
- (1917) A I R 1917 Lah 372 (372) : 39 Ind Cas 762, *Umrao Singh v. Lachhmi Narayan*.
- (1897) 21 Mad 153 (166) : 8 Mad L Jour 92, *Ittappan v. Manavikrama*.
- (1936) A I R 1936 Nag 214 (215) : 165 Ind Cas 177 : I L R (1937) Nag 177, *Khuaja Afzal v. Md. Sahab*.
- (1933) A I R 1933 Nag 340 (344) : 29 Nag L R 350 : 149 Ind Cas 622, *Mt. Mohankuar v. Bhagatram*.
- (1936) A I R 1936 Pat 136 (139) : 161 Ind Cas 331, *Mt. Bibi Zainab v. Muhammad Ayub*.
- (1923) A I R 1923 Oudh 61 (76) : 74 Ind Cas 225, *Thakur Rudra Pratap Narain v. Thakur Nirman Prasad*.
[But see (1933) A I R 1933 Nag 27 (27, 28) : 28 Nag L R 282 : 140 Ind Cas 831, *Muraduddin v. Mt. Umraobi*.]
22. (1930) A I R 1930 Cal 466 (468) : 128 Ind Cas 103, *Abdul Wahed v. Mohan Bashi Saha*.
- (1926) A I R 1926 Cal 881 (882) : 94 Ind Cas 88, *Sabitra Dasi v. Nadir Chand*.
- (1922) A I R 1932 Cal 54 (56) : 68 Ind Cas 200, *Jogendranath Mookherjee v. Rajendranath Bhattacharjee*.
- (1921) A I R 1921 Cal 647 (652) : 67 Ind Cas 31, *Jagannath Marwari v. Mt. Chandni Bibi*.
- (1915) A I R 1915 Cal 357 (358) : 27 Ind Cas 465, *Lokenath Singh v. Dhawalshwar*.

"ouster."²³ So also the mere fact that a co-owner sells a portion of the joint property,²⁴ or that the name of one of the co-owners alone is entered in the revenue papers, is not sufficient to constitute "ouster."²⁵

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Where the disputed parcels of land (which are the joint properties of the parties) do not form one property, the fact that the defendant has ousted the plaintiff as regards one of the parcels does not show that his possession of the other parcels was in assertion of an exclusive and hostile title.²⁶

Where a person already in possession in assertion of a hostile title subsequently becomes a co-owner, his possession does not cease to be adverse where he continues to assert a hostile title and exercise exclusive possession.²⁷

Where "ouster" is otherwise established, it is not affected by affirmations of right or applications for partition by the other co-owners.²⁸ Even though "ouster" at any *particular moment* is not proved, it is open to the Courts to find that there has been ouster for the statutory period.²⁹

The adverse possession of a co-owner may extend to a *portion* only of the common property.³⁰

The onus of proving "ouster" is on the co-owner who alleges that there has been "ouster."³¹

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- (1928) A I R 1928 Mad 652 (654) : 100 Ind Cas 553, *Venkatachalam Chettiar v. Annapoornamma*
23. (1938) A I R 1938 Bom 250 (253) . 175 Ind Cas 431, *Dattatraya Silaram v. Shankar*
24. (1935) A I R 1935 Cal 144 (145) . 151 Ind Cas 760, *Bhaba Kanta v. Kerpas Chutia*
(1920) 60 Ind Cas 298 (300) 24 Cal W N 1057 (1063), *Dalaram Guria v. Shyama Charan*
25. (1922) A I R 1922 All 399 (399) . 64 Ind Cas 24, *Deokinandan v. Zamir Hussain Khan*
(1929) A I R 1929 Oudh 337 (340) : 115 Ind Cas 440, *Bashir Ahmad v. Parshotam*
(1928) A I R 1928 Rang 95 (95) . 104 Ind Cas 383, *Mg Than Gyaung v. Ma Lun Daw*
(1929) A I R 1929 Sind 212 (215) 23 Sind L R 461 118 Ind Cas 207, *Abdur Rahman v. Haji Mahomed Idries*
(1909) 9 Ind Cas 425 (426) (Oudh), *Bharat Prasad v. Ganga Bahsh.*
26. (1931) A I R 1931 All 193 (195) 181 Ind Cas 211, *Shamim Ahmad v. Hsamul Haq*
(1909) 1 Ind Cas 252 (253) (Cal), *Narayan Chandra v. Basanta Kumari*
27. (1924) A I R 1924 Cal 118 (122) 76 Ind Cas 511, *Pankaj Mohan Rai v. Bipin Behary*
(1936) A I R 1936 Lah 991 (995) 167 Ind Cas 473, *Ude Singh v. Chittar.*
(1929) A I R 1929 Lah 521 (525) 117 Ind Cas 803, *Bahawal v. Ghulam Mahomed*
28. (1925) A I R 1925 Lah 183 (184) 78 Ind Cas 113, *Hira Singh v. Punjab Singh.*
29. (1927) A I R 1927 Mad 595 (596) 102 Ind Cas 300, *Venkata Rao v. Venkoba Rao*
30. (1924) A I R 1924 Mad 741 (747) 78 Ind Cas 87, *Venkatarama Iyer v. Subramania Sastry*
31. (1915) A I R 1915 All 30 (32) 26 Ind Cas 922 87 All 203, *Ahmad Raza Khan v. Ram Lal.*

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Subject to the above principles the question whether there has

- (1915) A I R 1915 All 138 (139) : 28 Ind Cas 276, *Mallah v. Behari*.
 (1866) 1 Agra 162 (163), *Damee Sing v. Dhurth Singh*.
 (1866) 1 Agra 285 (285), *Dabee Sukai v. Sheo Das Rai*.
 (1868) 3 Agra 241 (241), *Mehtab Singh v. Purma*.
 (1929) A I R 1929 Bom 323 (326, 327) : 119 Ind Cas 779, *Mallhari Faman v. Vinayak Ravji*.
 (1929) A I R 1929 Bom 424 (429) : 121 Ind Cas 439, *Mulji Narotam v. Hirulal*.
 (1922) A I R 1922 Bom 94 (95) : 67 Ind Cas 176, *Vinayak Keshav v. Bala Shitram*.
 (1903) 5 Bom L R 742 (744), *Bandacharya v. Shrinivasacharya*.
 (1907) 35 Cal 961 (970) : 6 Cal L Jour 735 : 12 Cal W N 127, *Jogendra Nath v. Baldeb Das*.
 (1934) A I R 1934 Cal 644 (647, 648) : 61 Cal 377 : 151 Ind Cas 461, *Jagadeshchandra Banerji v. Tayyab Sardar*.
 (1923) A I R 1923 Cal 356 (358) : 76 Ind Cas 328, *Dwarika Nath Sen v. Taraprasanno Sen*.
 (1877) 1 Cal L R 155 (166), *Rakhaldas Bundopadhyaya v. Indru Monce Debis*.
 (1936) A I R 1936 Cal 106 (109) : 40 Cal W N 777 (781) : 161 Ind Cas 450, *Nirmal Chandra Das v. Mohitosh Das*.
 (1869) 12 Suth W R 468 (468), *Brojonath Paul v. Sreegopal Paul*.
 (1930) A I R 1930 Lah 251 (252) : 122 Ind Cas 105, *Ghulam Muhammad v. Mt. Begum*.
 (1930) A I R 1930 Lah 914 (915) : 129 Ind Cas 699, *Ram Chand v. Gopal Singh*.
 (1924) A I R 1924 Lah 682 (683) : 78 Ind Cas 159, *Uda v. Maru Mal*.
 (1900) 1900 Pun Re No. 116, *Khindad v. Alamgir*.
 (1906) 1906 Pun L R No. 39, *Haji v. Gohna*.
 (1901) 24 Mad 441 (443), *Sellam v. Chinnammal*.
 (1897) 21 Mad 153 (159) : 8 Mad L Jour 92, *Ittappan v. Manavikrama*.
 (1891) 14 Mad 96 (97), *Alima v. Kutti*.
 (1929) A I R 1929 Mad 27 (29) : 114 Ind Cas 337, *Vaiyapur Chettiar v. Subramania Chettiar*.
 (1928) A I R 1928 Mad 652 (654) : 109 Ind Cas 553, *Venkatachalam Chettiar v. Annapurni Ammal*.
 (1893) 3 Mad L Jour 100 (104), *Rajyalakshmi v. Suryanarayana*.
 (1927) 1927 Mad W N 696 (701), *Arogaaswami v. Prakesi Ammal*.
 (1904) 1904 Pun L R No. 6, *Asim v. Ghulam*.
 (1936) A I R 1936 Nag 214 (215) : 165 Ind Cas 177 : I L R (1936) Nag 177, *Khawaja Afsal v. Mahomed Saheb*.
 (1930) A I R 1930 Oudh 200 (201) : 114 Ind Cas 497, *Nur Ali v. Shahzadi*.
 (1927) A I R 1927 Oudh 6 (7) : 98 Ind Cas 80, *Mt. Sughra Begam v. Nur Ali*.
 (1926) A I R 1926 Oudh 141 (142) : 72 Ind Cas 99, *Mahipal Singh v. Sarjoo Prasad*.
 (1924) A I R 1924 Oudh 266 (271, 272) : 27 Oudh Cas 77 : 78 Ind Cas 895, *Indarpal Singh v. Thakur Dui Singh*.
 (1914) A I R 1914 Oudh 228 (230) : 24 Ind Cas 633, *Jagannath v. Kedar*.
 (1936) A I R 1936 Pat 136 (139) : 161 Ind Cas 331, *Mt. Zamab v. Muhammad Ayub*.
 (1920) A I R 1920 Pat 634 (635) : 55 Ind Cas 247, *Radha Kanta Lal v. Bhagwat Prasad*.
 (1916) A I R 1916 Low Bur 77 (78) : 32 Ind Cas 568, *Ma Nyem Me v. Ma May*.
 (1933) A I R 1933 Sind 817 (820) : 27 Sind L R 101 : 150 Ind Cas 279, *Mt. Shamul v. Dost Mohamed Khan*.
 (1937) 167 Ind Cas 801 (801) (Nag), *Ramaji Gujar v. Kunwarjee Gujar*.
 (1926) 94 Ind Cas 855 (857) (Oudh), *Ahmadullah v. Daskir Ahmad*.
 (1911) 10 Ind Cas 551 (555, 556) : 5 Sind L R 49, *Asudomal v. Ali*.

been an ouster by one co-owner of other co-owners is one of fact depending upon the circumstances of each case³³

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Illustrative cases

1. *A* and *B* are co-owners of certain property. *A* begins to collect the rents of the land to the exclusion of *B* on the ground of exclusive title. His possession would be adverse to *B*.³³
2. *A*, *B* and *C* are co-owners of certain property. *C* dies and his share devolves upon his widow *D*. *A* and *B* are in possession of the property and maintain *D* from out of her share. The possession of *A* and *B* is not adverse to *D* even though she is not paid the full share of the profits.³⁴
3. *A*, *B* and *C* were members of a joint Hindu family. *A*, as manager, purchased certain property out of the joint family funds. Subsequent to the purchase, *A* applied to the Revenue authorities to include the name of a stranger to the family as the proprietor of a fourth share of the property. *A* died thereafter and *X*, who was then the sole surviving member of the family got into possession of all the property. It was held that assuming that the stranger was really entitled to a fourth share, he was in fact never in possession of the properties and that the possession of *X* was adverse to the stranger.³⁵
4. On a dispute between two brothers *A* and *B* as to the right to properties *X* and *Y*, one claiming exclusive right and the other a joint right in them, a compromise was effected between them by which property *X* was allotted to *A* and property *Y* allotted to *B*, and each party was from that date in exclusive enjoyment of the property allotted to him. It was held that the possession

(1911) 10 Ind Cas 575 (576) 35 Mad 618, *Muthuraku Thevan v Robert Gordon Orr*

[See (1939) A I R 1938 Lah 241 (241) 1 I L R (1938) Lah 558, *Karim Baksh v Shadi* (Co-sharer in separate possession of common property dispossessed by another co-sharer—Plaintiff suing for possession—Suit comes under Article 142 and the onus is on the plaintiff to prove dispossession within 12 years of suit)]

32 (1928) A I R 1928 Cal 216 (217) 55 Cal 896 109 Ind Cas 747, *Chandra Kishore v. Biseswar Pal*

(1927) A I R 1927 Cal 462 (463, 464) 101 Ind Cas 27, *Nabadrip Chandra v. Bagaban Chandra*

(1920) A I R 1920 Cal 473 (473) 47 Cal 274 56 Ind Cas 141, *Gorinda Chandra v. Dina Nath*.

(1918) A I R 1918 Cal 501 (502) 44 Ind Cas 216, *Ahamuddin Tamijuddin v. Amiruddin*

(1927) 107 Ind Cas 465 (466) 32 Cal W N 449 (451), *Amara Khatun v. Saburannessa Bibi*

(1925) A I R 1925 Nag 145 (146) 82 Ind Cas 432, *Kuturjee v. Rama*.

(1912) 14 Ind Cas 722 (723) (Cal), *Ayennessa Bibi v Sheikh Isuf*

(1910) 6 Ind Cas 1009 (1009) (Lah), *Farid-ud din v Ali Hussain*

33. (1916) A I R 1916 P C 96 (101) 43 Cal 660 33 Ind Cas 452 (P C), *Nrsityamoni Das v. Lakhan Chandra Sen*

34 (1875) 23 Suth W R 214 (216) 15 Peng L R 10 2 Ind App 113 3 Suther 91 3 Sar 480 (P C), *Aumirtolall Boss v Rajonechatt Mitter*

35 (1886) 9 Mad 483 (491) 13 Ind App 147 10 Ind Jur 425 4 Sar 728 (P C), *Ramalakshamma v Ramanna*

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of each of them of the property allotted to him would be adverse to the other from the date of the entry into possession under the arrangement.³⁶

5. *R* and *A*, co-owners of certain property, executed an unregistered deed of gift of it to *D*, who was the daughter of *R*, in 1895. *D* entered into possession in 1895 and continued in possession. In 1901 *R* died and *D* became entitled to *R*'s share of the property as her heir. More than twelve years after the death of *R*, *A*'s heirs sued *D* for possession alleging *inter alia* that *D*'s possession which began adversely to *A* ceased to be so when she became entitled to *R*'s share and thus became a co-owner with *A*. The contention was overruled and it was held that the adverse possession of *D* having begun adversely against both the co-owners in their lifetime, the character of the possession was not changed by her becoming entitled to a share on *R*'s death, that the ouster continued after *R*'s death, and that the possession of *D* was adverse throughout.³⁷
6. Two brothers constituting a joint Hindu family separated in 1865, but a particular property which had not been actually divided, was being enjoyed by one branch exclusively; they had the perception of the profits for more than the statutory period and in certain revenue proceedings as regards the portion of that property they had denied the title to such property of two other branches. From these circumstances their Lordships of the Privy Council came to the conclusion that there was an ouster of the other branches of the family.³⁸
7. *A*, one of several co-owners, usufructually mortgaged the property to *X* for purposes binding on all the co-sharers, and admitted therein their title. It was held that *A* could not be said to be in exclusive possession through the mortgagee, but the possession of the mortgagee must be taken to be on behalf of all the co-sharers.³⁹

See also the undermentioned cases.⁴⁰

36. (1938) 174 Ind Cas 128 (129) (P C), *Karunakar Takait Samanta v. Purna Chandra*.
37. (1919) A I R 1919 P C 44 (47) 43 Mad 244 : 46 Ind App 285 : 53 Ind Cas 901 (P C), *Varada Pillai v. Jeerarathnammal*.
38. (1931) A I R 1931 P C 48 (51) 130 Ind Cas 673 : 27 Nag L R 181 : 58 Ind App 106 (P C), *Gorindrao v. Rajabai*.
39. (1887) 1887 Bom P J 84, *Hasan Abdula v. Kasim Ahmad*.
40. (1895) 17 All 423 (424) . 1895 All W N 88, *Muhammad Husain v. Badri Prasad* (The fact that the defendant has resisted a former suit for profits by the plaintiff and that the latter has not received any profits shows adverse possession.)
- (1932) A I R 1932 All G1 (62) . 133 Ind Cas 899, *Mul Chand v. Thakur Das*. (Where an adoption by a Hindu widow has secretly taken place without the knowledge or assent of her deceased husband's brother who has remained in absolute and exclusive possession of the property, the adopted son cannot be said to be in constructive possession of the property in suit through the other party who will get a perfected title by adverse possession if he has remained in possession for more than 12 years from date of adoption)

Where there has been "ouster" of one co-owner by another, the adverse possession of the former is not interrupted by the mere fact that a decree is passed in favour of the latter establishing his right

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(1905) 1905 All W N 160 (161), *Ram Sarup v Gulzar Banu*. (Planting of grove on waste land by one of the co-sharers to the knowledge of other co sharers, does not mean an ouster of the latter by the former and hence there arises no cause of action under Art 142.)

(1901) 25 Bom 362 (366) 3 Bom L R 47, *Jaggivandas v. Bai Amba*. (In the case of a joint family consisting of three brothers, where no partition was proved, the mere fact that two of the brothers went to live in a neighbouring village would not make the possession of the third, who continued to live in the same village, necessarily adverse.)

(1899) 19 Bom 362 (366) 3 Bom L R 47, *Jaggivandas v. Bai Amba*.

(1887) 11 Bom 365 (367), *Dinkar Sadashiv v Bhikaji Sadashiv*. (Where

(1924) A I R 1924 Cal 45 (46) 50 Cal 487 74 Ind Cas 193, *Bhairabendra*

such possession not being referable to a lawful title)

(1937) A I R 1937 Lah 65 (67) : 171 Ind Cas 757, *Narindar Nath v Jas Nath*. (Suit by one cosharer for declaration that certain portion of joint property is exclusively his — No hostile overt act on his part before suit—Decree rejecting his claim but directing that property could not be partitioned until contribution by other cosharers to certain expenditure incurred by him — No mention of time limit—Exclusive possession by him for 12 years after decree— Possession held could not be adverse)

(1934) A I R 1934 Lah 84 (84) 148 Ind Cas 943, *Jisva Ram v Man Singh*. (Where the co-sharer has built his residential house on the land, it amounts to an assertion of hostile and exclusive title to the knowledge of the other co sharers)

(1932) A I R 1932 Lah 421 (422) : 189 Ind Cas 676, *Mt. Rakhi v. Mt. Khairan* (Possession of bigger share by co-sharer and unsuccessful suit by him asserting that others are no co-sharers at all—Held in the circumstances of the case that these did not constitute adverse possession as regards the bigger share in his possession)

(1929) A I R 1929 Lah 195 (198) 10 Lah 842 109 Ind Cas 658, *Mt. Ahmad Bibi v. Shamas Din*. (Application to Municipality for permission to build a wall by a tenant-in-common does not amount to a denial of title of other co-heirs)

(1927) A I R 1927 Lah 416 (417) 102 Ind Cas 9, *Kunjilal v Ramjilal*, (Individual proprietor cannot, by planting trees on common land without consent of all, appropriate it to his use and claim adverse possession — Held adverse possession started only when enclosure round these trees was constructed)

(1922) A I R 1922 Lah 102 (103), *Lala v. Khalas* (Where an entry regarding a well in dispute in existence in 1857 clearly shows that one co owner and his descendants have been claiming to be not only in possession of this well, but in possession as sole owners and the position was made clear to the others in the course of a litigation in 1891, held the possession had been adverse at least since 1891 and that it had ripened into complete ownership 12 years later)

(1917) A I R 1917 Lah 271 (272) 89 Ind cas 590, *Raj Kaur v Tirath Ram*. (A co-sharer's possession becomes adverse when he rebuilds a house making it pukka)

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as co-owner.⁴¹ But where the decree is a *consent* decree, the possession of the co-owner who is in possession becomes admittedly one on behalf of all the co-owners.⁴²

Where there is an "ouster" of one co-owner by another, the fact that the former's name is recorded in the revenue papers as co-sharer

(1927) A I R 1927 Mad 111 (112) : 99 Ind Cas 158, *Gorindasami Chettiar v. Kothandapani Chettiar*. (If in a joint property one co-owner absents himself for a number of years but his wife resides on the property, it is an evidence of non-exclusion of the absentee co-owner and the fact that the wife is entitled to the property also in another capacity makes no difference.)

(1923) A I R 1923 Mad 153 (156) : 74 Ind Cas 27, *Aburakkhar v. Kunhikuttigal*. (Elders male member of Thavazi being also Karnavan of Tarwad—Possession by him—Thavazi not in adverse possession against tarwad.)

(1921) A I R 1921 Mad 388 (390, 391) : 44 Mad 205 : 59 Ind Cas 464, *Meenakshi Achi v. Somasundaram Pillai*. (Where the management of a charity is carried on by one of the members of a joint family for some time exclusively on account of his better business capacity or otherwise, it does not amount to an ouster of the other members from management entitling the member in possession to prescribe for the trusteeship.)

(1938) A I R 1938 Nag 89 (90) : 178 Ind Cas 103, *Ramji v. Madhi*. (A partition between co-owners in exclusive possession does not amount to ouster or denial of title of the other co-owner not in possession.)

(1936) A I R 1936 Nag 282 (283) : 165 Ind Cas 934, *Mt. Krishnabai v. Parvati Bai*. (One co-sharer in exclusive and long enjoyment of property—Other co-owners not participating in profits of property and not in the enjoyment of the property coupled with the fact that the co-sharer in possession sold the property as his own without protest from other co-sharers—Inference of ouster is justified)

(1929) A I R 1929 Oudh 337 (340) : 115 Ind Cas 440, *Bashir Ahmad v. Parshotam*. (The mere fact that a co-sharer brought a suit to eject a trespasser is no evidence of denial of title of the other co-sharers and does not therefore amount to ouster)

(1919) A I R 1919 Oudh 404 (405) : 53 Ind Cas 1005, *Parmeshwar Din v. Ram Nath*. (Refusal of Revenue Court to effect partition of joint khewat till determination of shares by Civil Court—Opposite party is not vested with adverse title)

(1926) 94 Ind Cas 550 (551) (Lab), *Karam Din v. Mehr Din* (Where one of the heirs of a deceased person comes to occupy more than his share to the exclusion of the rightful heir of the excess share and alienates it and such alienation is accepted by the conduct of the latter, the possession of the former is adverse to the latter and ripens into ownership if it extends beyond twelve years.)

(1912) 18 Ind Cas 376 (377) (Cal), *Nagendra Kumar Nath v. Hara Chandra Poddar*. (Where one co-owner dealt with joint property as if it belonged exclusively to himself and alienated the whole of it to a stranger, the alienation was not binding on the other co-owner, and inasmuch as the other co-owner denied the interest of the first co-owner in the property.)

(1911) 12 Ind Cas 425 (426) (Lab), *Chiragh v. Mahamad Din* (Where a co-sharer's name and after him his son's name is entered in the Revenue Register and no objection was raised by the actual holders, held, there was no abandonment and adverse possession merely by reason of the change of residence.)

41. (1914) A I R 1914 Lah 284 (286) : 22 Ind Cas 805 : 1914 Pun Re No 45, *Albar v. Tabu*.

will not prevent the running of limitation against him.⁴³

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Notes 35-36

Where one co-owner leases his share to another, the original relationship of the parties as co-owners is revived on the termination of the lease and the possession of the *quondam* lessee is *prima facie* one on behalf of both the co-owners.⁴⁴

The principle that the possession of one co-owner is the possession of all does not apply where a stranger enters into possession claiming to be a fractional owner and his possession must be considered to be adverse to the real owner.⁴⁵

Where one co-owner acquires title by adverse possession to the share of the other also, an abandonment of possession by the former will not revive the title of the latter.⁴⁶

A and B are two Hindu coparceners. A dies leaving C as his heir. B takes possession of the separate property of A. The possession of B is adverse to C, the heir of A, the reason being that B and C are not co-owners with regard to the property.⁴⁷

See also the undermentioned cases⁴⁸

36. Possession of alienee from co-owner.—A co-owner may purport to alienate to a stranger —

1. his undivided share of the common property,
2. the entire common property, or
3. a specific *item* of the common property.

The purchaser in the *first class* may or may not be entitled to claim joint possession of the share purchased by him. In the case of an alienation by a coparcener of a joint Hindu family, for instance, the alienee is not entitled to joint possession of the share purchased, with the other coparceners, but is only entitled to an equity to obtain a partition of the properties. In some Provinces the alienation

43. (1895) 17 All 423 (424). 1895 All W N 88, *Muhammad Husain v Badra Prasad*.

(1924) A I R 1924 Lah 389 (391). 71 Ind Cas 805, *Muhammad Hassan v. Sohara*.

(1914) A I R 1914 Lah 284 (295); 22 Ind Cas 805; 1914 Pun Re No 15, *Ahlar v Tabu*.

(1921) 63 Ind Cas 881 (882) (Lah), *Hans Raj v. Maulu*.

44. (1931) A I R 1931 Bom 219 (220). 151 Ind Cas 1056, *Dharma Raghunath v. Keshav Gunajee*.

45. (1934) A I R 1931 Pat 485 (488). 154 Ind Cas 1032, *Dharichhana Kuari v. Ramyad Kuari*.

46. (1923) A I R 1923 Lah 362 (363). 76 Ind Cas 742, *Daulat Ram v. Nanak Chand*.

47. (1919) A I R 1919 Oudh 151 (157). 50 Ind Cas 180, *Mt Mahadev Kunwar v. Bahu Rani*.

48. (1926) A I R 1926 Cal 589 (590). 92 Ind Cas 908, *Siteswar Roy v Tepua Barman*. (Plaintiff setting out to prove *actual* joint possession and failing to do so cannot subsequently rely on the principle that the possession of one co-owner is the possession of all the co-owners.)

(1931) A I R 1931 Lah 251 (252). 134 Ind Cas 522, *Sonu Malit v Bheri Malit*. (A, B and C, three co-sharers in a house—A in adverse possession against C but not against B—C's share transferred to B—The adverse possession by A of such share ceases.)

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, Note 36

is void and the alienee is not entitled to the share at all, much less to the joint possession of such share. In cases in which he *is* entitled to joint possession, his possession of any portion of the property will not be adverse to the other co-owners. His possession will be that of a co-owner and is subject to all the rights and liabilities of a co-owner. "A person who takes a transfer from a co-tenant or a co-owner steps into the shoes of his transferor. When he takes the assignment he is clothed with all the rights and becomes subject to all the liabilities of his transferor. In short, he becomes as much a co-tenant or a co-owner as his transferor was before the transfer."¹ It follows that the possession of the alienee in such cases is not adverse to the other co-owners,² unless it could be shown that there has been an ouster. A contrary view has, however, been held in the undermentioned cases,³ namely that the position of an alienee is not the same as that of a co-owner and that his possession will become adverse from the date of his entry into possession. It is submitted that this view is not correct.

Where, in cases falling under the *first class*, the alienee is *not entitled to possession* at all by virtue of his purchase, his possession of any portion of the joint property cannot be referred to any lawful title to such possession and is consequently adverse to the co-owners

Note 36

1. (1930) A I R 1930 Oudh 475 (477, 478) : 125 Ind Cas 833, *Halim Shah v. Rahim Buz*.
[See also (1935) A I R 1935 Mad 1059 (1061) : 159 Ind Cas 1021, *Chenganakattil Modeen v. Pottengal Kunhali Kuttu*.]

r. Trikha.
3 593 : 56 Cal

Yenkatarama

- (1930) 125 Ind Cas 739 (740) (Cal) *Kuda Koch v. Madan Gopal Agarwala*.

- (1927) A I R 1927 Mad 111 (112) : 99 Ind Cas 158, *Gorindasami v. Kothandapani*. (Two Hindu brothers—One becoming a Muham-
 madian and then alienating his share.—P. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 9

- (1912) 1.

- 8 (1934) A I R 1934 Mad 183 (184) : 149 Ind Cas 455, *Palanippa Chetty v. Raman Chetty*. (The observations were *obiter*.)
(1920) A I R 1920 Mad 160 (160) : 54 Ind Cas 385, *Sheikh Abdur Gafur v. Ashamm Bibi*.

- (1926) A I R 1926 All 697 (698) : 96 Ind Cas 687, *Sajjad Husain v. Qurban Ali Beg.*

[See (1934) A I R 1934 Cal 71 (78) : 60 Cal 1212 : 149 Ind Cas 111, *Mons. Mohan Pal v. Gour Chandra Das*. (Lessees of different shares under different co-owners in a Zamindari are not themselves co-owners.)]

from the date of his entry into such possession.^{3a}

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In the *second class*, the alienation may or may not be valid as regards the share of the alienor. It is not valid as against the others. If it is valid as regards the alienor's share, and *he is entitled to possession* under such alienation, then his possession of any portion of the property must be referred to his title and is not adverse to the other co-owners.⁴ The contrary view expressed in the under-mentioned cases⁵ does not seem to be correct. If the alienation is valid as regards the alienor's share but the alienee is not entitled to joint possession, his possession of any portion of the property will be without title and will be adverse to the co-owners.⁶

In the *third class*, the possession of the alienee will be clearly adverse to the other co-owners, whether the alienation is valid or not. The reason is that a co-owner of property is himself not entitled, before partition, to any specific portion of the property, or to the possession of any such specific portion, and cannot convey to a stranger anything more than what he himself has. Consequently, the possession of the alienee will be without title and will be consequently adverse to the persons entitled.⁷ The decision in the

3a (1934) A I R 1934 Pat 502 (503) : 150 Ind Cas 903, *Rajinder Lall v Kuer Rai*

4. (1912) 17 Ind Cas 657 (658) : 37 Bom 84, *Mallappa v Mudhappa*.

[See (1923) A I R 1923 All 291 (291) : 71 Ind Cas 640, *Hafiz Abdulla v. Ali*.]

5. (1930) A I R 1930 Lah 214 (215) : 116 Ind Cas 890, *Ibrahim v. Ali Muhammad*.

(1931) A I R 1931 Mad 22 (23) : 129 Ind Cas 454, *Thiagaraja Pillai v. Appaiyoo Pillai*

6 (1922) A I R 1922 Mad 860 (871) : 70 Ind Cas 317, *Linga Munisami Reddi v. Govindasami Nair* (The decision is in conformity with principle, but the grounds of the decision are stated differently)

(1909) 1 Ind Cas 670 (674) (Cal), *Banwari Lal v Sheo Sankar Misser*.

(1936) A I R 1936 Lah 996 (998) : 167 Ind Cas 916, *Chhajumal v. Multan Singh*

(1931) 1931 M W N 889 (891), *Narayanadasami Ayyar v. Thandaisa Iyer*. (A and B coparceners—A alienating property to C but continuing in possession as lessee of C to knowledge of B—C must be held to be in adverse possession against B through A)

[But see (1915) A I R 1915 Mad 447 (448) : 25 Ind Cas 573, *Muthukrishna Iyengar v. Sankara Narayana Iyer*]

7 (1907) 2 Sind L R 43 (44, 45), *Dhunoomal Chandram v. Mt. Eaim Khatun*. (1898) 23 Bom 187 (142) (F B), *Bhairao v. Rakhmin*

(1922) A I R 1922 Lah 205 (207) : 71 Ind Cas 171, *Anwar v. Kishen Singh*

(1937) A I R 1937 Pesh 69 (70) : 170 Ind Cas 195, *Sher Mohamed Nauab Khan v. Asma Bibi*

(1924) A I R 1924 All 788 (739) : 80 Ind Cas 12, *Bainath v. Ram Bilas*.

(1932) A I R 1932 Bom 255 (255) : 137 Ind Cas 867, *Fakirappa v. Rudrappa*.

(1902) 1902 Pun L R No 1 (page 3), *Chint Ram v. Bakhtawar Rikh*

(1889) 12 Mad 292 (293), *Muttusami v. Rama Krishna*.

(1926) 51 Mad L Jour 83 (83) (N R C)

(1918) A I R 1918 Low Bur 119 (119) : 42 Ind Cas 121, *Hla Gyau v. Aung Pyu* (Article 142 will apply to the case—The case will be one of dispossession of the others)

[See also (1926) A I R 1926 Oudh 500 (501) : 95 Ind Cas 438, *Ram Udit v. Bhagwat Prasad*]

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undermentioned case⁸ seems to proceed on the view that the possession of the alienee of a specific portion of the joint property from a co-owner, will amount to an *ouster* of the other co-owners and that therefore the possession would be adverse.

Suppose now that the alienee of a share of joint property from a co-owner does not obtain any possession, in a case in which he is entitled to be put in joint possession. It would follow from what has been stated above that the alienee being a co-owner himself, the possession of the other co-owners of even *the property alienated would not be* adverse to the alienee. The contrary view has, however, been expressed in the case cited below,⁹ on the ground that the principle that the possession of a co-owner is not adverse to the others, is not applicable to the case of transferees from co-owners. It is submitted that this view is not correct on principle.

Where *A* is in possession of property belonging to himself and *B* jointly, but *B*, though not in possession actually, has not been proved to have been *ousted* by *A*, *A*'s possession is not adverse to *B* and, if *B* alienates his share to *C*, is not adverse to *C* also¹⁰ If the alienee is, however, ousted from possession, the possession of the other co-owners will, of course, be adverse to the alienee.¹¹

A and *B* were co-owners of a property, *A* being entitled to three-fourths and *B* to one-fourth thereof. Subsequently, they entered into an arrangement whereby each of them enjoyed a specific property as his share. *B*'s one-fourth share was then sold to *C* in execution of a decree against *B*. *C* was obstructed in the delivery of possession and thereupon he sued *B* and *A* for possession. He however obtained a decree declaring that he was entitled to joint possession of one-fourth share in the entire property with *A* on the basis that the partition arrangement was not binding on him. *B* appealed from the decree and the same was confirmed in 1863 by the Appellate Court. *A* thereupon in 1873 sued *C* for his twelve annas share. It was held that the possession of *C* and *B* became adverse, if at all, only from the date of the appellate decree in 1863.¹²

37. Possession of licensee from co-owner.—The possession of a licensee from a co-owner is adverse to the other co-owner.¹ But

8. (1936) A I R 1936 Pesh 24 (26) : 160 Ind Cas 952, *Jang Bahadur v. Abdul Nur*.

9. (1924) A I R 1924 Lah 682 (683) : 78 Ind Cas 159, *Udi v. Marumal*.

10. (1934) A I R 1934 Bom 273 (275) : 58 Bom 410 : 154 Ind Cas 824, *Anant Ganpati v. Vishnu Rambhau*.

(1916) A I R 1916 All 19 (21) : 86 Ind Cas 100, *Ram Parson v. Kalab Husain*.

(1899) 24 Bom 101 (111) : 1 Bom L R 466, *Dhondo v. Vasudeo*.

11. (1934) A I R 1934 Bom 273 (275) : 58 Bom 410 : 154 Ind Cas 824, *Anant Ganpati v. Vishnu Rambhau* (Exclusive receipts of profits may point to ouster)

12. (1879) 5 Cal 644 (653) : 7 Ind App 1 : 6 Cal L R 71 : 4 Sar 86 : 4 Ind Jour 142 : 3 Suther 697 : 3 Shome L R 157 (P C), *Diwan Manwar Ali v. Annodapersad Rai*.

Note 37

1. (1924) A I R 1924 Cal 693 (697) : 51 Cal 135 : 81 Ind Cas 493, *Savilaja Nath Ray v. Reshee Case Law*.

the Oudh Chief Court has held a contrary view.²

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38. Effect of partition among co-owners. — Where, after partition has taken place, one co-owner is in possession of a portion allotted to another, such possession is *prima facie* adverse to the latter, the reason being that such possession is not that of a co-owner.¹

Suppose *A* and *B* are co-owners of certain property. *A* is in possession of the whole property adversely to *B*. Before the expiry of the statutory period, however, a partition is made between the parties. But *A* continues to be in possession of the whole property even after partition. Such possession is adverse to *B* as regards the portion allotted to him. But it has been held that the partition creates a fresh title in favour of *B* and that, hence, he is entitled to a fresh period of twelve years from the date of partition for bringing a suit for possession against *A*.²

Where certain property belonging to a Hindu joint family is in the possession of one of the coparceners and such property is left undivided at a partition among them, the possession of the former continues to be that of a co-owner and is therefore not adverse.³

39. Co-owner deriving possession from a third party claiming adversely against all the co-owners. — Where a third party is in adverse possession against all the co-owners of a property and one of the co-owners then obtains possession of the property from such third party under a lease or other kind of transfer by him, the possession of such co-owner not being referable to his title

(1891) 1891 Bom P J 59, *Dalaji v. Maruti*.

2 (1937) A I R 1937 Oudh 503 (505) 171 Ind Cas 89, *Wajid Ali v. Dr. Mohammad Naziruddin Husam*.

Note 38

1 (1923) A I R 1923 Lah 362 (363) 76 Ind Cas 742, *Daulat Ram v. Nanak Chand*.

(1877) 1877 Bom P J 191, *Devapa Mahabala v. Ganpaya Annaya*.

(1886) 11 Bom 221 Note (b) · 1893 Bom P J 262, *Vithoba v. Narayan*.

(1904) 9 Oudh Cas 55 (61) *Prag Dat v. Chote Singh*.

(1912) 13 Ind Cas 790 (790) 1911 Pnn Re No. 81, *Fatehdin v. Nishla*.

(1930) A I R 1930 All 845 (846) 128 Ind Cas 820, *Narayan Singh v. Mahabir Singh* (Possession under the impression that it belongs to him is adverse).

[See (1928) 109 Ind Cas 458 (459) (Lah), *Dhola v. Sant Saran Singh* (Possession not necessarily adverse)]

2 (1920) A I R 1920 Oudh 223 (223) 57 Ind Cas 448, *Hanoman Singh v. Ratan Singh*.

(1921) A I R 1921 Lah 83 (81) 67 Ind Cas 425, *Muhammad Din v. Muhammad*.

(1887) 2 C P L R 116 (118), *Dadu v. Raja*.

3 (1924) A I R 1924 Mad 113 (114) 74 Ind Cas 1018, *Rajagopala Iyengar v. Soundra Raja Iyengar*.

(1929) A I R 1929 Mad 27 (28) 114 Ind Cas 337, *Vaniyapuram Chettiar v. Subramanya Chettiar*.

(1917) A I R 1917 Pat 613 (614) 40 Ind Cas 115, *Jagadambal v. Diku Lal*.

(1909) 1 Ind Cas 408 (411) 32 Mad 191, *Vandhanatha Aiyer v. Arasamy Annai*.

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as co-owner, is adverse to the other co-owners.¹

Where one co-owner, acting on his own behalf and not on behalf of all co-owners, recovers common property from a trespasser, the possession of such co-owner is adverse to the other co-owners.²

40. Adverse possession against alienee of share in property.—

A and *B* are co-owners of a certain property. *A* is in sole possession of the property on behalf of both the co-owners. *B* sells his share in the joint property to *C*. *A* continues to be in sole possession. *A*'s possession is not adverse to *C* also, the reason being that *C* is a co-owner with him.¹

Where a person sells a *share* of his interest in a certain property and continues in possession of the whole property, such possession is not adverse to the alienee.²

41. Adverse possession by co-owners against stranger.—

Where the co-owners of a property encroach upon the adjacent property and such property is in the occupation of one or other of the co-owners continuously for the statutory period, such possession is on behalf of *all* the co-owners in a representative capacity and is not that of *independent* trespassers. Hence, at the end of the statutory period, the co-owners will acquire a title to the property.¹

42. Abandonment by co-owner.—Where one co-owner abandons his share of the joint property, the subsequent possession of the property by the other co-owner is on behalf of himself alone and not on behalf of both the co-owners.¹

Note 39

1. (1916) A I R 1916 Cal 59 (59) : 35 Ind Cas 26, *Bisessar Gangooly v. Bhagabai Charan*.
- (1917) A I R 1917 Cal 315 (318) : 35 Ind Cas 86, *Jatindra Nath Roy v. Sabidannessa Khatun*.
- (1934) A I R 1934 Cal 356 (363) . 60 Cal 1406 : 149 Ind Cas 410, *Subodh-chandra Niyogi v. Bhupalika Dasee*. (Stranger acquiring title to joint property by adverse possession — Purchase from such stranger by one of the co-owners — Possession of such co-owner is not one on behalf of the other co-owners.)
- (1921) A I R 1921 Cal 616 (617) . 64 Ind Cas 553, *Bholanath De v. Golabdi Sardar*.
2. (1921) A I R 1921 Lah 163 (164), *Zulphi v. Asghar*.

Note 40

1. (1929) A I R 1929 Cal 250 (252) : 56 Cal 616 : 117 Ind Cas 593, *Biswanath Chakravarti v. Rabiya Khatun*.
- (1928) A I R 1928 Lah 957 (958) : 120 Ind Cas 604, *Fateh Muhammad v. Ghulam Muhammad*.
- (1916) A I R 1916 Mad 430 (432, 433) . 29 Ind Cas 976, *Hassan Ammal Bibi v. Ismail Moodeen*.
2. (1881) 3 Mad 212 (215), *Kanara Paniker v. Ryrappa Paniker*.
- (1933) A I R 1933 Lah 763 (763) : 148 Ind Cas 1112, *Mam Raj v. Chhotu*.

Note 41

1. (1931) A I R 1931 Lah 232 (233) : 131 Ind Cas 341, *Asimullah v. Ghulam Mohammad*.

Note 42

1. (1916) A I R 1916 Cal 99 (100) : 35 Ind Cas 72, *Tomejuddi v. Mulai Choukidar*.

43. Relinquishment by co-owner.—Where one co-owner relinquishes his share of the property in favour of the other co-owners, but the deed of relinquishment is invalid for want of registration, the possession of the other co-owner is adverse to the co-owner who has relinquished his share.¹

**Arts. 142 & 144
Notes 43-44**

44. Co-heirs.—The doctrine that the possession of one co-owner is *prima facie* not adverse to the other co-owners is applicable to co-heirs also.¹ This principle applies also to the co-heirs of a Mahomedan.² The contrary view taken in the undermentioned

Note 43

1. (1917) A I R 1917 All 47 (48) . 42 Ind Cas 713 . 39 All 696, *Jhampu v. Kutramani*.

Note 44

1. (1914) A I R 1914 P C 243 (245) (P C), *Corea v. Appuhamy*.
(1890) 1890 Pun Re No 97, *Lachhman Singh v. Sohan Singh*.
2. (1931) A I R 1931 All 193 (194) . 131 Ind Cas 211, *Shamin Ahmad v. Hesamul Haq*.
(1924) A I R 1924 All 384 (386) 46 All 377 : 79 Ind Cas 174, *Mubarak-un-Nissa v. Muhammad Raza Khan*.
(1919) A I R 1919 All 202 (203) 50 Ind Cas 691, *Haider Khan v. Chand Khan*.
(1916) A I R 1916 All 19 (20, 21) . 36 Ind Cas 100, *Ram Parson Upadhyia v. Kalab Husain*.
(1912) 15 Ind Cas 292 (293) (All), *Chand Khan v. Ali Khan*.
(1881) 1881 All W N 90 (90), *Izaatunnissa v. Muhammad Taqi*.
(1929) A I R 1929 Bom 141 (143) : 118 Ind Cas 785, *Bai Jui v. Bai Bibanboo*.
(1921) A I R 1921 Bom 56 (56) : 45 Bom 519 . 59 Ind Cas 780, *Nuridin Najbuddin v. Bu Umrav*.
(1879) 1879 Bom P J 296, *Imam Saheb v. Sayad Hazratsaheb*.
(1926) A I R 1926 Cal 480 (480) 91 Ind Cas 725, *Sourab Bibi v. Abbas Ali Biswas*.
(1925) A I R 1925 Cal 1176 (1180) 85 Ind Cas 763, *Asiruddin Mondal v. Latifunnessa Bibi*.
(1875) 24 Suth W R 1 (1), *Moonshee Sirdar v. Molungo Sirdar*.
(1864) 1864 Suth W R 377 (377, 378), *Bacharam Chowdry v. Mahtab Beebee*.
(1936) 170 Ind Cas 89 (90) (Lah), *Jagan Nath v. Begum Bibi*.
(1931) 134 Ind Cas 491 (491) (Lah), *Jalat Din v. Karam Nur*.
(1930) A I R 1930 Lah 251 (252) 122 Ind Cas 105, *Ghulam Muhammad v. Mt Begam*.
(1930) A I R 1930 Lah 78 (79) 119 Ind Cas 335, *Mt Umat-Ul-Habibi v. Abdul Karim*.
(1929) A I R 1929 Lah 464 (464) 10 Lah 819 118 Ind Cas 905, *Muhammad Baksh v. Fateh Mahammad*.
(1929) A I R 1929 Lah 195 (198) 10 Lah 842 122 Ind Cas 81, *Ahmad Bibi v. Shamas Din*.
(1922) A I R 1922 Lah 193 (194) 77 Ind Cas 257, *Hasham Ali v. Umar Hayat*.
(1921) A I R 1921 Lah 197 (198) 59 Ind Cas 346, *Murad Bibi v. Rahim Baksh*.
(1925) A I R 1925 Mad 287 (287) 84 Ind Cas 896, *Dada Sahib v. Azim Mohi-din Sahib*.
(1916) A I R 1916 Mad 1207 (1210) 29 Ind Cas 275, *Mariam Dira Ammal v. Khader Meera Sahib Taragan*.
(1910) 6 Ind Cas 579 (580) 34 Mad 74, *Noonsleen Saib v. Ibrahim Saib*.
(1933) A I R 1933 Nag 27 (27) . 23 Nag L R 252 140 Ind Cas 831, *Muradu-din v. Mt Umraobi*.

as co-owner, is adverse to the other co-owners.¹

Where one co-owner, acting on his own behalf and not on behalf of all co-owners, recovers common property from a trespasser, the possession of such co-owner is adverse to the other co-owners.²

40. Adverse possession against alienee of share in property.—

A and *B* are co-owners of a certain property. *A* is in sole possession of the property on behalf of both the co-owners. *B* sells his share in the joint property to *C*. *A* continues to be in sole possession. *A*'s possession is not adverse to *C* also, the reason being that *C* is a co-owner with him.¹

Where a person sells a *share* of his interest in a certain property and continues in possession of the whole property, such possession is not adverse to the alienee.²

41. Adverse possession by co-owners against stranger.—

Where the co-owners of a property encroach upon the adjacent property and such property is in the occupation of one or other of the co-owners continuously for the statutory period, such possession is on behalf of *all* the co-owners in a representative capacity and is not that of *independent* trespassers. Hence, at the end of the statutory period, the co-owners will acquire a title to the property.¹

42. Abandonment by co-owner.—

Where one co-owner abandons his share of the joint property, the subsequent possession of the property by the other co-owner is on behalf of himself alone and not on behalf of both the co-owners.¹

Note 39

1. (1916) A I R 1916 Cal 59 (59) : 35 Ind Cas 26, *Biswaswar Gangooly v. Bhagabai Charan*.
- (1917) A I R 1917 Cal 345 (348) : 35 Ind Cas 36, *Jatindra Nath Roy v. Sabidannessa Khatun*.
- (1934) A I R 1934 Cal 356 (363) : 60 Cal 1406 : 149 Ind Cas 410, *Subodh-chandra Niyogi v. Bhupalika Dasee*. (Stranger acquiring title to joint property by adverse possession — Purchase from such stranger by one of the co-owners — Possession of such co-owner is not one on behalf of the other co-owners.)
- (1921) A I R 1921 Cal 616 (617) : 64 Ind Cas 553, *Bholanath De v. Golabdi Sardar*.
2. (1921) A I R 1921 Lah 163 (164), *Zulphi v. Asghar*.

Note 40

1. (1929) A I R 1929 Cal 250 (252) : 56 Cal 616 : 117 Ind Cas 593, *Biswanath Chakravarti v. Rabiya Khatun*.
- (1928) A I R 1928 Lah 957 (958) : 120 Ind Cas 604, *Fateh Muhammad v. Ghulam Muhammad*.
- (1916) A I R 1916 Mad 430 (432, 433) : 29 Ind Cas 976, *Hassan Ammal Bibi v. Ismail Moodeen*.
2. (1881) 3 Mad 212 (215), *Kanara Paniker v. Nyrappa Paniker*.
- (1933) A I R 1933 Lah 763 (763) : 148 Ind Cas 1112, *Mam Raj v. Chhotu*

Note 41

1. (1931) A I R 1931 Lah 232 (233) : 131 Ind Cas 341, *Asmullah v. Ghulam Mohammad*.

Note 42

1. (1916) A I R 1916 Cal 99 (100) : 35 Ind Cas 72, *Tomejuddi v. Mulai Chowkidar*.

43. Relinquishment by co-owner.—Where one co-owner relinquishes his share of the property in favour of the other co-owners, but the deed of relinquishment is invalid for want of registration, the possession of the other co-owner is adverse to the co-owner who has relinquished his share.¹

**Arts. 142 & 144
Notes 43-44**

44. Co-heirs.—The doctrine that the possession of one co-owner is *prima facie* not adverse to the other co-owners is applicable to co-heirs also.¹ This principle applies also to the co-heirs of a Mahomedan.² The contrary view taken in the undermentioned

Note 43

1. (1917) A I R 1917 All 47 (48) : 42 Ind Cas 713 : 39 All 696, *Jhamphu v. Kutramani*.

Note 44

1. (1914) A I R 1914 P C 243 (245) (P C), *Correa v. Appuhamy*.
(1890) 1890 Pun Re No. 97, *Lachhman Singh v. Sohan Singh*.
2. (1931) A I R 1931 All 193 (194) : 131 Ind Cas 211, *Shamin Ahmad v. Hesamul Haq*.
(1924) A I R 1924 All 834 (386) : 46 All 377 : 79 Ind Cas 174, *Mubarak-un-Nissa v. Muhammad Raza Khan*.
(1919) A I R 1919 All 202 (203) : 50 Ind Cas 691, *Haider Khan v. Chand Khan*.
(1916) A I R 1916 All 19 (20, 21) : 36 Ind Cas 100, *Ram Parson Upadhyay v. Kalab Husain*.
(1912) 15 Ind Cas 292 (293) (All), *Chand Khan v. Ali Khan*.
(1881) 1881 All W N 90 (90), *Izaatunnissa v. Muhammad Taqi*.
(1929) A I R 1929 Bom 141 (143) : 118 Ind Cas 785, *Bai Jai v. Bai Bibanboo*.
(1921) A I R 1921 Bom 56 (56) : 45 Bom 519 : 59 Ind Cas 780, *Nuridin Naybuddin v. Bu Umruv*.
(1879) 1879 Bom P J 296, *Imam Saheb v. Sayad Hazratsaheb*.
(1926) A I R 1926 Cal 480 (480) : 91 Ind Cas 725, *Sourab Bibi v. Abbas Ali Biswas*.
(1925) A I R 1925 Cal 1176 (1180) : 85 Ind Cas 763, *Asiruddin Mondal v. Latifunnessa Bibi*.
(1875) 24 Suth W R 1 (1), *Moonshee Sudar v. Molungo Sirdar*.
(1864) 1864 Suth W R 377 (377, 378), *Bacharam Chowdry v. Mahtab Beebee*.
(1936) 170 Ind Cas 89 (90) (Lah), *Jagan Nath v. Begum Bibi*.
(1931) 134 Ind Cas 491 (491) (Lah), *Jalal Din v. Karam Nur*.
(1930) A I R 1930 Lah 251 (252) : 122 Ind Cas 105, *Ghulam Muhammad v. Mt. Begam*.
(1930) A I R 1930 Lah 78 (79) : 119 Ind Cas 335, *Mt. Umat-ul-Habibi v. Abdul Karim*.
(1929) A I R 1929 Lah 464 (464) : 10 Lah 849 : 118 Ind Cas 905, *Muhammad Baksh v. Fateh Mahammad*.
(1929) A I R 1929 Lah 195 (198) : 10 Lah 842 : 122 Ind Cas 81, *Ahmad Bibi v. Shamas Din*.
(1922) A I R 1922 Lah 193 (194) : 77 Ind Cas 257, *Hasham Ali v. Umar Hayat*.
(1921) A I R 1921 Lah 197 (198) : 59 Ind Cas 346, *Murad Bibi v. Rahim Bakhsh*.
(1925) A I R 1925 Mad 287 (287) : 84 Ind Cas 896, *Dada Sahib v. Aziz Mohiddin Saheb*.
(1916) A I R 1916 Mad 1207 (1210) : 29 Ind Cas 275, *Mariam Bibi Ammal v. Khader Meera Sahib Taragan*.
(1910) 6 Ind Cas 579 (590) : 31 Mad 74, *Noonsleen Saib v. Ibrahim Saib*.
(1933) A I R 1933 Nag 27 (27) : 23 Nag L R 282 : 140 Ind Cas 831, *Muraddin v. Mt. Umraobi*.

Arts. 142 & 144 decisions¹ is not correct.
Notes 44-45

45. Suit for possession by one co-owner against another—Article applicable.—Where one co-owner has originally been in possession of the whole property on behalf of all the co-owners, but subsequently his possession has become adverse to the other co-owners, a suit by the latter for joint possession or partition will fall under Article 144¹ (except where the case falls under Article 127 *supra*).

- (1929) A I R 1929 Oudh 521 (523) : 121 Ind Cas 881; 4 Luck 261, *Mohammad Ali v. Mumtaz Ali*.
 (1925) A I R 1925 Oudh 241 (242) : 78 Ind Cas 282, *Abdul Shakur Khan v. Muhammad Ali Khan*.
 (1924) A I R 1924 Rang 155 (158) : 1 Rang 405 : 76 Ind Cas 855, *Maung Po Kin v. Maung Shwe Dya*.
 (1925) A I R 1925 Sind 207 (215) : 78 Ind Cas 23 : 18 Sing L R 149, *Usman v. Asaf*.
 3. (1907) 1907 All W N 195 (196) : 4 All L Jour 473, *Channji Mal v. Nathia*.
 (1927) A I R 1927 Lah 790 (790) : 100 Ind Cas 145, *Mt. Allah Jawar v. Mahomed Baksh*.
 (1923) A I R 1923 Lah 519 (520) : 73 Ind Cas 425 : 4 Lah 402, *Mt. Zainab v. Ghulam Rasul*.
 (1888) 1888 Pun Re. No. 89, *Nasir-Ud-din Shah v. Mt. Lal Bibi*.
 (1936) A I R 1936 Rang 407 (411) : 160 Ind Cas 501, *Mahomed Ameen v. Eusoof Hajee Ahmed*.

Note 45

1. (1932) A I R 1932 All 512 (519, 520) : 54 All 916 : 148 Ind Cas 230, *Shukrulla v. Mt. Zohra Bibi*. (Suit for joint possession—Article applicable is Article 144.)
 (1897) 21 Mad 153 (159) : 8 Mad L Jour 92, *Ittappan v. Manavikrama*. (Suit for recovery by partition of share in immovable property—Article applicable is Article 144 and not Article 142.)
 (1923) A I R 1923 Lah 499 (502) : 110 Ind Cas 18, *Tara Singh v. Ram Saran*. (Do)
 (1920) A I R 1920 Mad 763 (770) : 43 Mad 298 : 59 Ind Cas 978, *Venkatapayya v. Venkataranga Rao*. (Do.)
 (1936) A I R 1936 Pat 68 (69, 70) : 159 Ind Cas 453, *Mukhlam Rai v. Chandradeep Rai*. (Do.)
 (1916) A I R 1916 Mad 430 (432) : 29 Ind Cas 976, *Hassan Ammal Bibi v. Ismail Moudeen Rowther*. (Do)
 (1908) 5 Bom L R 742 (744), *Bandacharya v. Shrinivasacharya*. (Do.)
 (1913) 19 Ind Cas 411 (413, 414, 415) : 1913 Pun Re No. 20, *Basheshwar Nath v. Devi Pershad*. (Do)
 (1892) 1892 Bom P J 202, *Kusa v. Kesu*. (Do)
 (1935) A I R 1935 All 774 (776) : 155 Ind Cas 824, *Daboo Singh v. Ram Manohar*.
 (1923) A I R 1923 Lah 519 (520) : 73 Ind Cas 425 : 4 Lah 402, *Mt. Zainab v. Ghulam Rasul*.
 (1923) A I R 1923 Cal 356 (358) : 76 Ind Cas 328, *Duarka Nath v. Tara Prasanno* (Common-way—Obstruction by one co-sharer—Suit by other for declaration and removal of obstruction is governed by Article 144.)
 (1891) 14 Mad 96 (97), *Atma v. Kutta* (Defendant in possession on behalf of himself and plaintiff—Article 144—Suit

(Do)
 Lal v.

Bhagwat Prasad.

[See (1920) A I R 1920 Bom 26 (26) : 44 Bom 943 : 53 Ind Cas 42, *Kala Gouda Patil v. Bibishaya Shah*.]

It has been held that where all the co-owners of a property have been in joint possession but subsequently one of them is dispossessed or discontinues his possession, a suit by the latter for joint possession or partition will come under Article 142.² The correctness of these decisions is doubtful in view of the fact that in such cases the possession of the defendant cannot be said to be adverse to the plaintiff from the moment of his *entry*. (See Note 2 *supra*.)

Arts. 142 & 144
Notes 45-46

See also the undermentioned case³

As to the limitation applicable to suits between *co-heirs* for share of inheritance, see Note 4 to Article 123, *supra*.

46. Adverse possession of trust property by trustee.—A trustee cannot, by setting up his own title to the trust property, acquire by adverse possession a title to the property.¹ In *Srinivasa-*

- 2 (1925) A I R 1925 Rang 233 (235) . 88 Ind Cas 609, *Ma Nan Thu v Ma Shwe Mi*
- (1934) A I R 1934 All 993 (1002) 57 All 278 . 152 Ind Cas 1 (FB), *Budhyachal Chand v. Ram Gharib Chand*
- (1938) A I R 1938 Lah 241 (241) I L R 1938 Lah 558, *Karim Bahsh v. Shadi*
- (1906) 28 All 479 (480) 1906 All W N 95 3 All L Jour 334, *Deba v. Roktagh Mal* (Property of tenants-in-common—One leaving possession and the other continuing in possession—Held that there is discontinuance of possession within Article 142.)
- (1902) 5 Oudh Cas 6 (9), *Jagdamba Bahsh v. Sitla Bahsh*.
3. (1909) 4 Ind Cas 298 (299) 5 Low Bur Rul 112, *Ma Le v. Ma Hmyin*. (Co-owners enjoying property by turns — Plaintiff not availing himself of his turn when it came — Plaintiff cannot be said to have discontinued possession within Article 142)

Note 46

1. (1927) A I R 1927 P C 270 (272) 107 Ind Cas 344 (P C), *Sunmonu v. Disa Raphael*
- (1897) 19 All 277 (291) 24 Ind App 10 7 Sar 131 1 Cal W N 265 (P C), *Bitto Kunuar v Kesho Prasad Misr*
- (1938) A I R 1938 Nag 335 (346) 177 Ind Cas 6 (F B), *Asaram v. Ludheswar*.
- (1911) 11 Ind Cas 447 (448) : 34 Mad 257 38 Ind App 129 (P C), *Srinivasa Murthy v Venkatarada Iyengar*
- (1866) 10 Suth W R 172 (172) . 1 Beng L R A C 114, *Jagannath Pal v Bidyanand*. (Before the Limitation Act of 1871 any trustee could acquire the trust property by adverse possession)
- (1923) A I R 1923 Cal 1 (7) 50 Cal 49 74 Ind Cas 630, *Charu Chandra v. Nakush Chandra* (Breach of trust for over 12 years—No prescriptive title)
- (1848) 2 Deg & Sm 122 (163) 12 Jur 210 79 R R 151, *Attorney General v. Munro* (Do)
- (1872) 17 Suth W R 190 (191), *Ranee Khajoorunnissa v Mt Roheemunnissa*. (An executor holding an estate in trust to pay the profits in certain defined shares to the heirs of the testator, cannot plead adverse possession against them)
- (1930) A I R 1930 Mad 563 (567) 125 Ind Cas 227, *Kalatty Mudaly v. Mangapathi Mudali*
- (1935) A I R 1935 Mad 483 (485) 157 Ind Cas 181, *Manickammal v. Murugappa*
- (1914) A I R 1914 Mad 477 (479) 37 Mad 373 14 Ind Cas 168, *Pattakara Manakkal Kuppen v Munde Kottul*
- (1877-78) 2 Bom 888 (413), *Lallubhai Bapubhai v. Mankumarbai*
(See also (1865) 34 Peav 576 (582, 583) 34 L J Ch 582 12 L T 557 : 11 Jur (N S) 649 13 W R 527 6 N R 243, *Liver v. Piclerford*.)

Arts. 142 & 144 *murthy v. Venkatavarada Iyengar*,² their Lordships of the Privy Council observed as follows :

Note 46

" No person who has accepted the position of a trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself."^{2a}

In *Bitto Kunwar v. Kesho Prasad*,³ the Privy Council again expressed a similar view in the following passage :

"Their Lordships can only understand their (the High Court's) thinking thus by supposing that they were of opinion that although there might be a trust, Bachcha Tewari and Ram Kishen (the trustees) might acquire a title by having possession of the property and appropriating it to their own use. The learned Judges appear not to have had in their minds the statement of the law in Sections 63 and 64 of the Indian Trusts Act, 1882."

The principle above stated, namely that a trustee cannot acquire title by adverse possession of the trust property, applies equally to *quasi* or constructive trustees,⁴ to the managers of religious endowments⁵ and in fact to all persons who stand in a fiduciary relation to

(1861) 30 Beav 461 (470) : 31 L J Ch 29 : 7 Jur (N S) 1268 : 5 L T (N S) 570 : 10 W R 26 : 132 R R 363, *Newsome v. Flowers*.

(1884) 11 Cal 17 (30, 32), *Hafon Manick v. Bur Sing*]

2. (1911) 11 Ind Cas 447 (448) : 34 Mad 257 : 38 Ind App 129 (P C).

2a. See also (1929) A I R 1929 Cal 297 (298) : 56 Cal 914 : 119 Ind Cas 289, *Gaya Prasad v. Balya Mani Dass*.

(1920) A C 636 (653) : 89 L J P C 65 : 123 L T 121, *Taylor v. Davies*.

3. (1897) 19 All 277 (291) : 24 Ind App 10 : 1 Cal W N 265 : 7 Sar 131 (P C).

[See also (1911) 9 Ind Cas 540 (541) (Lah), *Sohandan v. Aurang Khan*.]

4. (1936) A I R 1938 Nag 335 (346) : 177 Ind Cas 6 (F B), *Asaram v. Ludheswar*.

(1930) A I R 1930 Mad 563 (565) : 125 Ind Cas 227, *Kalatty Mudaly v. Mangapathy Mudali*.

[See also (1914) A I R 1914 Lah 378 (379) : 26 Ind Cas 345, *Prem Singh v. Mokand Singh*. (Religious endowment—Mahant's possession is not adverse to founder unless founder's title is repudiated—Founder's heir can oust trespasser in the absence of a mahant.)

(1860) 12 Suth W R 319 (319) : 3 Beng L R A C 409, *Rakhaldas Madak v. Madhusudhan Madak*.

(1899) 21 All 829 (340) : 1899 All W N 106, *Muhammad Munawar Ali v. Bawalan Baki*. (Dewan takes possession of an estate as behalf of sion is not d a refusal

[But see (1934) A I R 1934 All 990 (992), *Ram Chandra v. Jaith Mal*.

(1924) A I R 1924 Oudh 321 (325) : 78 Ind Cas 859, *Raunaq Ali v. Nazir Husain*.]

5. (1932) A I R 1932 Lah 603 (604) : 138 Ind Cas 809, *Lachhman Das v. Arya Pratimudhi Sabha*. (A manager of a temple cannot convert himself into a full owner by treating the property as his own private property.)

others.⁶ In the case of express trustees it has been recognised in Section 10 of the Act which provides that no suit against an express trustee or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time.

**Arts. 142 & 144
Notes 46-49**

47. Adverse possession of alienee from trustee.—Section 10 of the Act does not apply to a suit against an assignee for *consideration* from a trustee, and hence, a suit for possession against a transferee for valuable consideration of the trust property from the trustee is governed by the ordinary period of limitation. In *Sub-baiya Pandaram v. Muhammad Mustafa*,¹ it was observed by their Lordships of the Privy Council that the exception (that is the exception from the operation of Section 10, of the case of assigns for valuable consideration) shows that in that event the claim may be defeated by adverse possession.

48. Adverse possession of right to perform worship in temple.—A right to perform a particular kind of worship in a Hindu temple as *stapavanam*, i.e. bathing the idol, offering *neivedyam* and *deeparadhana*, can be acquired by prescription.

Where a right of worship is divisible, into separate parts, the acquisition of a prescriptive right to perform a minor worship will not carry with it the right to perform the major worship.¹

49. Adverse possession of property of Hindu, Muhammadan or Buddhist religious endowments.—Religious institutions of Hindus, Muhammadans or Buddhists are recognised as juridical persons capable of holding property.¹ It follows that they can also acquire property by the adverse possession² and likewise lose property

(1927) A I R 1927 Mad 50 (52) 98 Ind Cas 442, *Pratap Sinha v. Simja Raja Sahib*.

(1934) A I R 1934 Mad 391 (392, 393) 150 Ind Cas 156, *Sami Ayyengar v. Venkataramana Ayyengar*.

(1935) A I R 1935 Nag 35 (42) 31 Nag L R 189 157 Ind Cas 17, *Ram Suaroop v. Thakur Ramchandrajee Mandir*.

(1910) 8 Ind Cas 578 (590) (All), *Fakhruddin v. Kifayatullah*.

6 (1921) A I R 1921 Pat 166 (170) 61 Ind Cas 807 6 Pat L Jour 273, *Abdul Rahim v. Mt. Baiwa*.

(1933) A I R 1933 Cal 295 (303, 304) 60 Cal 54 144 Ind Cas 792, *Suren-draKrishna Roy v. Ishwar Bhuvaneshwari Thakurani* (There can be no adverse possession against an idol by the shebait, as he stands in a fiduciary relation to the idol).

Note 47

1. (1923) A I R 1923 P C 175 (178) 50 Ind App 295 46 Mad 751 74 Ind Cas 492 (P C).

Note 48

1. (1913) 18 Ind Cas 475 (476) (Mad), *Iyyalurai Gurukul v. Ramaswamy Gurukul*.

Note 49

1 (1914) A I R 1914 Oudh 255 (259, 261, 262) 24 Ind Cas 72, *Sitaramji v. Jadunath Singh*.

2 (1923) A I R 1923 Cal 142 (145) 50 Cal 292 74 Ind Cas 793, *Ananda-chandra Chakrabarti v. Bhojpal Singh*.

Arts. 142 & 144 by the adverse possession of a stranger.³ As a *material object or property*, and not as an *institution*, a Hindu idol or a Muhammadan mosque can itself be acquired by adverse possession.⁴

Note 49

It is, however, only in an ideal sense that property can be said to belong to an institution as a juridical person. The possession and management must necessarily be entrusted to some person as its manager. As pointed out by their Lordships of the Privy Council in *Prosonno Kumar Debye v. Golab Chand Baboo*⁵:

"... it is only in an ideal sense that property can be said to belong to an idol; the possession and management of it must, in the nature of things, be entrusted to some person as *shebait* or manager. It would seem to follow that the person so entrusted must, of necessity, be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir."

But the person entrusted with the management of the property of an institution is only the manager and custodian of the institution.⁶ He is not a *trustee* in the strict sense of the term.⁷ But by S. 10 of the Act such manager is to be *deemed* to be a trustee. As such, and even apart from it by virtue of his fiduciary position, such a manager cannot set up adverse possession with regard to the properties of the institution and acquire title to them on his own behalf by prescription.⁸ For the same reason, no limitation will apply to a suit for possession of the endowed property against a gratuitous transferee thereof. But a suit against a transferee for valuable consideration will not be exempt from the bar of limitation as Section 10 does not apply to such cases. Such a transfer, however, although made without legal necessity is not void *ab initio* in all cases. If the manager was not purporting to sell or transfer the property of the juridical person as *manager* but was purporting to make the transfer as owner in his own personal right, the transfer is

(1914) A I R 1914 Oudh 255 (262) : 24 Ind Cas 72, *Sitaramji v. Jadunath Singh*.

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4. (1938) A I R 1938 Lah 369 (375) 175 Ind Cas 945 (FB), *Masjud Shahid Ganj v. S G P. Committee*

(1929) A I R 1929 All 315 (318) : 51 All 621 . 116 Ind Cas 433, *Dasami Sahu v. Param Shameswar*

5. (1875) 2 Ind App 145 (152) 4 Beng L R 450 . 23 Suth W R 253 : 3 Suther 102 3 Sar 449 (PC), *Prosunno Kumar Debye v. Golab Chand Baboo*.

6. (1922) A I R 1922 P C 123 (126) : 65 Ind Cas 161 : 48 Ind App 302 . 44 Mad 831 (PC), *Vidya Varuthi Thiruthasamigal v. Balusami Ayyar*.

7. (1922) A I R 1922 P C 123 (126) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi Thiruthasamigal v. Balusami Ayyar*.

8. See cases cited in Foot-Note (5) to Note 46.

void *ab initio* and time will run against the institution even from the date of the transfer.^{8a} If however he purports to transfer the property as *manager*, the transfer is valid till it is set aside or till the death, resignation or removal of the transferor. Hence, the possession of the transferee, where the transfer is made without legal necessity, does not become adverse to the institution till the death, resignation or removal of the transferor, and hence a suit for possession against him within twelve years of such death or resignation or removal will be in time.⁹ This principle is now specifically embodied in Article 134 B.¹⁰ But where the alienation is of the *office* of the manager, it is void *ab initio* and the adverse possession of the transferee will begin as soon as he takes possession of the office and the endowed properties under the transfer.¹¹

Arts. 142 & 144
Note 49

Where a *stranger* gets into possession of the endowed property, his possession will be adverse to the institution from the date of the entry and the fact that the manager of the institution is succeeded by another will not give him a fresh starting point of limitation.¹²

8a (1938) A I R 1938 Mad 60 (63), *Venkatasubramania v. Sivagurunatha*.

9 (1935) A I R 1935 P C 44 (46) 153 Ind Cas 1100 62 Ind App 47 57 All 159 (PC), *Mahadeo Prasad Singh v. Karia Bharti*

Cas 214 60 Ind

App 302 44 Mad
Iyengar v. Iyengar.

Cas 452, *Sarabdeo*

Bharathi v. Ram Bai

(1913) 19 Ind Cas 558 (559) 37 Bom 224, *Mahamadgias Dadasaheb v. Rajabaksha*.

(1926) A I R 1926 Cal 913 (915) 95 Ind Cas 644, *Raja Manindra Narain Roy v. Executors, Bhuvan Chandra Estate*

(1916) A I R 1916 Lah 239 (240) 32 Ind Cas 558, *Fazal Ilahi v. Zafar Ali*.

(1933) A I R 1933 Lah 25 (27) 18 Lah 677 140 Ind Cas 604, *Gurduara Parbandhak Committee v. Premdas*

(1923) A I R 1923 Mad 545 (550) 72 Ind Cas 789, *Jagga Rou v. Gari Bibi*.

(1926) A I R 1926 Mad 769 (770) 49 Mad 543 96 Ind Cas 371, *Rama Reddy v. Ranga Dasan*

(1936) A I R 1936 Mad 262 (263) 162 Ind Cas 325, *Veerana Goundan v. Sellappa Goundan*

(1930) A I R 1930 Mad 422 (424) 124 Ind Cas 155, *Chidambara Sivaprakasam Pandara Sannadhi Somasundaram Pillai*

(1935) A I R 1935 Mad 60 (63), *Venkatasubramania v. Sivagurunatha*

(1939) A I R 1939 Cal 21 (22), *Charuchandra v. Nritya Gopal*

[But see (1926) A I R 1926 Oudh 444 (447) 95 Ind Cas 27 2 Luck 239, *Parkasdas v. Janki Ballabha Saran* (No longer good law)]

10. See (1893) 20 All 482 (487) 1893 All W N 123 (F B), *Dehari Lal v. Muhammad Muttakli* (View that possession of the transferee is adverse from the date of the transfer is no longer good law)

11. (1899) 23 Mad 271 (279) 27 Ind App 69 4 Cal W N 329 10 Mad L Jour 29 2 Bom L R 597 7 Sar 671 (P C), *Gnanasambanada Pandara Sannadhi v. Velu Pandaram*

(1910) 7 Ind Cas 240 (240) 37 Ind App 147 37 Cal 885 (P C), *Damodar Das v. Lakhnan Das*

12 (1935) A I R 1935 Cal 81 (86) 176 Ind Cas 695, *Panna Sundari v. Lenares Bank Ltd*

(1912) 14 Ind Cas 142 (144) 39 Cal 887, *Jharula Das v. Jalandhar Thakur*.

Arts. 142 & 144
Note 49

Where a stranger enters into possession of the endowed property claiming to be a *manager thereof*, his possession will not be adverse to the institution itself, but will be adverse against the trustee. The stranger will, after twelve years of such possession, acquire the *right of a manager* of the institution.¹³

(1900) 23 Mad 439 (441) : 9 Mad L Jour 8, *Chidambaram Chetty v. Minammal*

(1907) 6 Cal L Jour 621 (636), *Lilabati Misra v. Brishun Chobey*. (Adverse possession against female shewait operates effectively as against the succeeding male shewait.)

(1922) A I R 1922 Mad 406 (407) : 70 Ind Cas 369, *Madura Detasthanam v. Samia Pillai*. (Meikkavalgar in possession of *manbhram* lands for 12 years after his dismissal from office—Suit for possession by his successor is barred.)

(1935) A I R 1935 Mad 449 (451), *Rajagopala Naidu v. Ramasubramania Ayyar*. (Nominee of villagers to manage village temple property dismissed and new one appointed—Suit by newly appointed nominee against the dismissed nominee for possession of temples and properties—Previous nominee setting up right in himself repudiating claim of villagers—Adverse possession of previous nominee starts from date of repudiation.)

(1923) A I R 1923 Mad 545 (550) : 72 Ind Cas 789, *Jagga Row v. Gari Bibi*.

(1935) A I R 1935 Mad 483 (486) : 157 Ind Cas 181, *Manickammal v. Murugappa Gramani*.

(1922) A I R 1922 Oudh 24 (25) : 66 Ind Cas 941, *Abdur Rashid v. Janaki Das*.

(1923) A I R 1923 Rang 40 (40) : 79 Ind Cas 273, *U Waiseikla v. U Parama*.

(1936) A I R 1936 Mad 188 (189) : 161 Ind Cas 234, *Jagathambal Anni v. Periaithambi Nadar*.

adverse possession)

(1925) A I R 1925 Cal 140 (143) : 84 Ind Cas 91 : 51 Cal 953, *Administrator General of Bengal v. Balkissen Misser*.

(1933) A I R 1933 Pat 6 (17) : 141 Ind Cas 157 : 11 Pat 701, *Chaturbhuj Singh v. Sarada Charan Guha*.

(1926) A I R 1926 All 392 (393) : 48 All 348 : 93 Ind Cas 652, *Chitar Mal v. Panchu Lal*.

(1900) 3 Ind Cas 98 (99) (Cal), *Ram Kisto Mohapatra v. Jagannath Mohapatra*

The institution cannot be regarded as a perpetual minor under disability; see : (1938) A I R 1938 Lah 369 (385) : 175 Ind Cas 945 (F B), Masjid Sahid Ganj v. S. G. P. Committee

(1932) A I R 1932 Mad 328 (333) : 137 Ind Cas 487, *Periyannan Chetty v. Govinda Rao*.

(1930) A I R 1930 Cal 673 (676) : 123 Ind Cas 195, *Debendra Nath Sadhukhan v. Naharmal Jalan*.

was adverse for more than 12 years)

App 204 : 53 Ind

chalam Chetty v.
he office will not

however be adverse)

(1912) 16 Ind Cas 225 (232) (Mad), *Veeraraghata Thathachariar v. Srinivasa Thathachariar*.

50. Possession of co-trustees after division among them.— **Arts. 142 & 144**

The fact that joint shebait of an institution divide the debutter property between them and apply the rents and profits thereof to their own use, will not make their possession adverse to the institution. The reason is, as has been seen in Notes 46 and 49 above, that a shebait stands in regard to the idol in a fiduciary relationship and will not be permitted to set up adverse possession against the institution.¹

Notes 50-52

51. Possession of alienee from co-trustee. — Where the management of a religious endowment is vested in two persons, and one of them alienates a part of the property of the endowment to a stranger, it has been held by the High Court of Bombay that a suit by the other for the recovery of the property alienated is governed by Article 144, that time would run from the date of the alienation, and that the alienation cannot be considered to be valid for the lifetime of the transferor.¹ Where one co-shebait transferred certain property to a stranger, and the stranger purported to come in only as co-sharer of the other co-shebait, the possession of such stranger is merely that of a co-owner, and is not adverse to the others in the absence of proof of ouster.²

52. Acts referable to exercise of easement. — It has been seen in Note 18 *ante*, that possession is never considered adverse if it can be referred to a lawful title. Acts, therefore, which can be referred to an easement right on the part of the person doing them, cannot be considered to be adverse to the true owner, and cannot constitute dispossession of the true owner, inasmuch as a dispossession involves, necessarily, as seen in Note 9 *ante*, an *adverse* possession of the property as against the true owner.^{1a} *A* was the owner of a party wall between the houses of *A* and *B*. *B* had a right of easement of support for resting his rafters on the wall. In a suit for possession by *A* of the wall, *B* contended that *A* had been dispossessed by *B* more than 12 years before suit by reason of the

(1918) A I R 1918 Mad 183 (190) 44 Ind Cas 630, *Raman Somayajipad v. Kunhu Kutti Kovilamma* (Samudayi can acquire the rights of uralan (trustee) by prescription.)

[See also (1929) A I R 1928 Mad 327 (334) 51 Mad 720 103 Ind Cas 305, *Chockalingam v. Duraiswami* (The rights of a trustee can be acquired by prescribing for those rights)]

Note 50

1. (1933) A I R 1933 Cal 295 (304) 60 Cal 51 144 Ind Cas 792, *Surendra Krishna Roy v. Ishwar Bhuvaneshwari*.

Note 51

1. (1933) A I R 1933 Bom 26 (30) 141 Ind Cas 103, *Narayan Balwant v. Datatraya Ramchandra*.
[See also (1882-84) 7 Mad 337 (338), *Kannan v. Nilakandan*.]
2 (1935) A I R 1935 Cal 641 (648) 158 Ind Cas 656, *Indian Iron & Steel Co. v. Bara Gopal Thakur*.

Note 52

- 1a. (1920) A I R 1920 Pat 38 (41) : 57 Ind Cas 51C, *Pardip Singh v. Secretary of State*

Arts. 142 & 144 fact that *B* had been plastering his side of the wall without interference by the plaintiff. It was held that the acts alleged to have been done by *B* can be referred to his right of easement, that they were not adverse to the existing title and that they did not constitute any dispossession of *A*.¹

Whether the acts alleged are referable to the right of property or possession, or acts of mere right of easement independent of possession, will depend upon the facts and circumstances of the particular case.² In *Watson and Co. v. The Government*,³ Sir Barnes Peacock, C. J., observed as follows :

"The exercise of such acts of ownership of jungle lands as would ordinarily be exercised over property of that nature would be evidence of possession. For instance, if it were proved that the Ghatwals were in the habit of cutting or preserving the wood, gathering wax or wild honey, collecting stick, lac, etc., (these) may all be evidence of acts of ownership or possession; and those who have to deal with the facts of the case must determine whether the acts were referable to the right of property or possession or acts of mere right of easement independent of possession."

Where it was proved that the plaintiff and his ancestors had for many generations levied cesses and imposts, whenever they could, from the inhabitants of certain hills, exercised the right of hunting elephants and of cutting the adjoor tree, and exacted certain occasional services from the hillmen, it was held that there was nothing in those acts which could be evidence of any proprietary right in the soil of the hills, but that they were acts of mere right of easement independent of possession.⁴

52a. Adverse possession — Vendor and vendee. — Where a person sells immovable property to another but continues in possession of the property, the vendor's possession is adverse against the vendee from the date of the sale,¹ though the vendee may not have paid the purchase-money.²

1. (1903) 31 Mad 523 (529) : 4 Ind Cas 619, *Sundrasastriar v. Govinda Mandarayan*.

2. (1867) 8 Suth W R 343 (350), *The Government v. Rajah Raj Kishen Singh*. (1865) 3 Suth W R 73 (80). Beng L R Supp Vol 182, *R. Watson & Co. v. The Government*.

3. (1865) 3 Suth W R 73 (80) : Beng L R Supp Vol. 182.

4. (1867) 8 Suth W R 343 (350), *The Government v. Rajah Raj Kishen Singh*.

Note 52a

1. (1899) 18 Bom 424 (428), *Sayad Nyamtulla v. Nana Faridsha*. (11 Cal 229, Followed.)

(1866) 1 Agra 110 (111), *Ungnee Lall v. Hoolasee*.

[See also (1886) 1896 All W N 96 (96), *Kalu v. Kishore*.

(1888) 1888 Bom P J 231, *Rama v. Hajarsmal*.]

2. (1893) 1893 Bom P J 491, *Ramji v. Vinayak*.

(1910) 8 Ind Cas 364 (365) : 34 Mad 543, *Velayuda Chetty v. Gotindaswami Naicker*. (The vendee of immovable property is entitled to possession of property when the conveyance has been duly effected even though the purchase money has not been paid to the vendor.)

In such a case, the remedy of the vendee is by a suit for *possession* to which Art. 144 applies and not by a suit for *specific performance* of a contract to which Art. 113 will apply.³

Arts. 142 & 144.
Note 52a

Where at the date of the sale, the property is in the possession of a third party from whom the vendor subsequently obtains possession, the vendor must be deemed to be in adverse possession against the vendee only from the date when the vendor gets possession.⁴ (See Note 4 to Article 136 *supra*.)

A property in the possession of a usufructuary mortgagee is sold first to *A* and then to *B*. *B* (who is not entitled to the property) redeems the property and enters into possession of it. *B*'s possession is adverse to *A* from the date of his *entering into possession* and he cannot be deemed to be in adverse possession from the date of the sale in his favour.⁵

Where property in the possession of a usufructuary mortgagee is sold, there can be no adverse possession by the vendor against the vendee till the mortgage is redeemed and possession obtained by the vendor.⁶

A sells a half portion of certain property to *B* but continues in possession of the whole property under a rent note for one year executed by *B* in respect of the half portion sold to him. *A* holds over after the expiry of the one year and sells the whole property to *C*. *A*'s suit for joint possession against *C* is governed, not by Article 139 but by Article 144. The reason is that on the expiry of the lease, *A* becomes a co-owner in possession and so the suit against *C* who derives his right from *A* is one against a co-owner in possession and not against a tenant holding over.⁷

A sells to *B* property *P* and delivers possession of the property to *B*. *A* then obtains from *B* possession of the property *P* giving *B* in exchange, property *R*. Subsequently, *C* obtains against *B* a decree establishing that *A* was not entitled to the property *R* and that himself (*C*) was entitled to it. *B* then sues *A* for recovery of property *P*. *B*'s right to sue accrues only from the date of the decree negating *A*'s right to property *R* and *A*'s possession of the property *P* becomes adverse to *B* only from such date.⁸

A enters into a contract with *B* for the sale of certain property and delivers possession of the property to *B* in pursuance of such contract. The sale, however, is not completed. *B*'s possession under the contract for sale is only a provisional holding on the sufferance

3. (1911) 9 Ind Cas 238 (239) 1911 Pun Re No 18, *Bhajan Ram v. Solaura*.

4. (1888) 19 Bom 424 (428), *Sayad Nyamtulla v. Nana Faridsha*.

5. (1912) 14 Ind Cas 513 (515) (Lab), *Mohan Lal v. Bhagu Shah*.

6. (1887) 1857 All W N 103 (104), *Birangi v. Ram Saran*.

7. (1921) A I R 1921 Bom 462 (462) 60 Ind Cas 589, *Ichalal Jagmohandas v. Nago Sma Patim*.

8. (1871) 16 Suth W R 270 (270), *Kabul Krishna Dass v. Mohessuree Debi*.

Arts. 142 & 144 of A and not adverse to A.²
Notes 52a-52b

See also the undermentioned decisions.¹⁰

52b. Possession held under mistake, if can be adverse.—Where A enters into possession of property belonging to B, claiming it to be his own and denying the title of B, the possession of A is adverse to B although A may be under an honest mistake and may not have any intention of depriving B of any property which may lawfully belong to him.¹ Similarly, the fact that the *true owner* is under a mistake as to his rights and does not know that the property trespassed upon by another belongs to himself, will not make the possession of the trespasser other than adverse.² Even where the mistake is shared by *both* the parties, possession held under a claim of right by a person who really has no right to the property will be adverse to the true owner.³

In some decisions, however, it has been held that where a person *believes* that he is entitled to a certain property, his possession cannot

9. (1877) 1877 Bom P J 184, *Varda v. Lakhna*.

10. (1929) A I R 1929 All 799 (800): 119 Ind Cas 110, *Ram Dubey v. Har Narain*.
(Sale of property in possession of usufructuary mortgagee—Vendee

(1936) A I R 1936 Mad 593 (600): 167 Ind Cas 594, *Krishna Kurup v. Rashukhath* (Property of tarwad set apart for maintenance—Property in possession of tenant of tawazhi—Sale by karnavan of tarwad—Tawazhi still enjoying possession for over 20 years without interruption—Purchaser not taking possession—Possession of tawazhi held adverse and purchaser could not recover property from tawazhi or tenants.)

(1919) A I R 1919 Pat 447 (451, 452): 53 Ind Cas 114, *Badr Chaudhuri v. Harbans Jha*. (Where the owner of property executed a fraudulent transfer with some ulterior motive but continued in possession of the property for more than 12 years, he is entitled not only to confirmation of possession but to recover possession if he subsequently loses it, even though the fraud intended to be effected was effected.)

Note 52b

1 (1871) 12 Eq 149 (152): 40 L J Ch 775, *Williams v. Pott*.

(1937) A I R 1937 Lah 811 (812): 177 Ind Cas 158, *Amar Nath v. Ram Ralha*.

(1918) A I R 1918 Nag 84 (85), *Bhagwan v. Sadhuram*.

(1930) A I R 1930 Mad 679 (682): 125 Ind Cas 545, *Secretary of State v. District Board of Tanjore*.

(1925) A I R 1925 Rang 111 (111): 83 Ind Cas 132: 1 Rang 492, *Ma Shan Ma v. Somasundaram Chetty*.

2. (1936) A I R 1936 Pat 179 (183, 184): 161 Ind Cas 855, *Prish Chandru Nandi v. Ramji Bachar Das*.

(1920) A I R 1920 Mad 295 (302): 59 Ind Cas 689, *Secretary of State v. Venkatanarasimha Naidu*.

3. (1918) 18 Ind Cas 869 (874) (Cal), *Dwarla Nath Chowdhury v. Shastri Kinkar Bannerjee*. (A and B in joint possession of A's estate under

(1903) 23 Bom 57 (91): 5 Bom L R 674, *Pursotam v. Sagaji*.

be adverse because there is no intention to hold adversely to any one.⁴ Similarly, it has been held that possession by the defendant whose right is admitted by the plaintiff under a mistaken belief as to the rights of the parties cannot be adverse to the plaintiff.^{4a} It is submitted that the above two views are not correct.

In the undermentioned case,⁵ a partition took place among certain co-owners. But, owing to a mistake, each of the co-owners took possession of plots that were not allotted to him at the partition but to some other co-owner. Even after the mistake was discovered they continued to hold the same plots as before. It was held that the possession of none of the parties was *adverse*. The reason given was that in the circumstances of the case the possession of each of the parties must be held to be *permissive*, inasmuch as it must be inferred that each of them intended to hold the plots in his possession only so long as the plots to which he was entitled were retained by the other party. It was also pointed out that none of the parties was entitled to the possession of the plots allotted to him at the partition until he was dispossessed of the plots which were in his possession, and so the principle that possession cannot be adverse to a person who has no present right to possession applied.

A, a watandar in the Bombay Presidency, had two sons, B and C. B was born prior to the adoption of A, and C after his adoption. The law was that only the son born after the adoption was entitled to the watan property inherited in the adoptive family. But by mistake C allowed B (the son born before adoption) to share in the enjoyment of the property as a *co-sharer*. The Bombay High Court, while conceding that the possession taken by a stranger under a mistake common to all the parties can be adverse, held that in the peculiar circumstances of the case, the possession of B must be held to be *permissive* and not adverse to C.⁶ See also the undermentioned case⁷ for a similar decision.

53. Possession of wrongdoer must be actual.—In order to sustain a claim to land by limitation there must be *actual* possession of a person claiming as of right by himself or by persons deriving title from him.¹ A mere *intention* to possess is not sufficient.² There

4 (1937) A I R 1937 Sind 78 (80) 157 Ind Cas 283, *Mt Sitabai v Juno*

4a (1921) A I R 1921 Lah 175 (175), *Indar Singh v Bahshisha*

5 (1922) A I R 1922 Oudh 152 (156) 66 Ind Cas 461, *Maqbul Ahmad v Farhat Ali*

6 (1928) A I R 1928 Bom 287 (288) 110 Ind Cas 303, *Keshav Baghunath v. Goriind*

7. (1921) A I R 1921 Lah 175 (175), *Indar Singh v. Dalshisha*

Note 53

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Hear-
int to

act of physical possession)

(1927) A I R 1927 Oudh 141 (142) 1 Luck 441 98 Ind Cas 704 29 Oudh Cas 395, *Darjoi Singh v Sidh Nath*

2 (1935) A I R 1935 Cal 760 (762) 159 Ind Cas 752, *Dharam Iroon v Lalrai v Manindra Chandra Roy*

rts. 142 & 144
Notes 53-54

must be both absence of possession by the person who has the right and *actual* possession by another to bring the case within the Statute.³ A trespasser's adverse possession will therefore be confined to the area actually occupied by him. In *Nageswar Bux v. Bengal Coal Co.*,⁴ their Lordships of the Privy Council observed as follows:

"Now there is undoubted authority for the proposition that when a person without any colour of right wrongfully takes possession as a trespasser of the property of another, any title which he may acquire by adverse possession will be strictly limited to what he has actually so possessed. The maxim *tantum prescriptum quantum possessum* is rigorously applied to him."⁵

Where the defendant is in possession of some land, but it is not identified with the land in dispute in the suit, a plea of limitation by adverse possession must be rejected.⁵

Neither proof of title nor an adjudication on the question of title is proof of actual possession.⁶

The theory of *constructive* possession applies only to the rightful owner and not to a trespasser,⁷ and he cannot acquire any title by prescription on the ground of any such possession.⁸

54. Adverse possession of surface and of sub-soil rights in the land.—Where a person is in adverse possession of land, normally he will acquire not only a title to the surface but also to the sub-soil.¹ It has, however, been held by the Privy Council that where a Zamindar in India makes a grant of a permanent tenure to another, the presumption is that only *surface* rights are thereby granted and that the Zamindar remains in the eye of the law in constructive

1. 6 Cal W N
41 Gupta.
15am.

4. (1931) A I R 1931 P C 186 (188) : 10 Pat 407 : 58 Ind App 29 : 180 Ind Cas 315 (P C).

(1926) A I R 1926 Pat 335 (391) : 96 Ind Cas 1027, *Keshabji v. Shash Bhusan*.

5. (1932) A I R 1932 P C 126 (128) : 136 Ind Cas 625 (P C), *Shama Kant Lal v. Ramdhan Puri*.

6. (1928) A I R 1928 Nag 284 (286) : 111 Ind Cas 602 : 24 Nag LR 148 : 29 Cri L Jour 902, *Shriram v. Samirmal*.

7. (1935) A I R 1935 Cal 760 (762) : 159 Ind Cas 752, *Bhabani Prosanna v. Manindra Chandra*.

(1935) A I R 1935 Pat 254 (256) : 155 Ind Cas 122, *Mt. Krishna Kuer v. Secretary of State*.

8. (1913) 20 Ind Cas 821 (823) (Cal), *Budhu Kumar v. Hafiz Husain*.

(1915) A I R 1915 Cal 464 (473) : 29 Ind Cas 156, *Amrita Sundari Devi v. Serajuddin Ahmed*.

Note 54

1. (1901) 1 Ch 738 (744) : 49 W R (Eng) 474 : 70 L J Ch 411 : 84 L T 225, *Midland Railway Co. v. Wright*.

possession of the sub-soil.² Evidence of long possession of the surface by the tenure-holder in such cases is not evidence of adverse possession of the sub-soil.³

**Arts. 142 & 144
Note 54**

As to adverse possession of the sub-soil, it is a well recognised principle that there can be separate ownership of different strata of the sub-soil, at all events, where minerals are involved, and that the adverse possession of one strata is not necessarily adverse possession of another strata.⁴ In *Low Moor Co. v. Stanley Coal Company*,⁵ Lord Cairns observed :

"It is true that in cases where a man has entered upon and taken possession of one seam of coal, and by lapse of time has acquired some title to it, the law will not assume that his possession extends to other seams of coal lying under that particular line."

There is no presumption in law that the possession of a part of a seam infers possession of the whole seam, much less the seams in the mineral field in which part of a seam has been worked.⁶ The principle underlying the propositions stated above is that title by adverse possession can be acquired only to that area of which actual possession has been enjoyed.⁷

In considering the character and effect of acts of possession in the case of mineral fields, it is, however, necessary to bear in mind the nature of the subject and the possession of which it is susceptible. Owing to the inaccessibility of minerals in the earth, it is not possible to take actual physical possession at once of a whole mineral field, it can be occupied only by extracting the minerals and until the whole minerals are exhausted the physical occupation must necessarily be partial.⁸ It is, however, necessary that the working of the minerals should be so general as to indicate that the defendant had taken possession of the whole mineral field.^{8a} The removal of a small quantity of mineral from here and there will not be sufficient.^{8b} But

2. (1931) A I R 1931 P C 89 (89) 58 Ind App 125 58 Cal 1187 131 Ind Cas 753 (P C), *Gobinda Narayan Singh v. Sham Lal Singh*

(1931) A I R 1931 P C 162 (164) 132 Ind Cas 610 58 Ind App 228 59 Cal 80 (P C), *Bhupendra Narayan v. Rajeswar Prosad*

3. (1931) A I R 1931 P C 89 (94) 131 Ind Cas 753 58 Ind App 125 58 Cal 1187 (P C), *Gobinda Narayan Singh v. Sham Lal Singh*

4 (1931) A I R 1931 P C 162 (164) 132 Ind Cas 610 58 Ind App 228 59 Cal 60 (P C), *Bhupendra Narayan v. Rajeswar Prosad*

5 (1876) 34 L T (N S) 186

6. (1931) A I R 1931 P C 186 (186) 10 Pat 407 58 Ind App 29 130 Ind Cas 315 (P C), *Nageshwar Bux Roy v. Bengal Coal Co. Ltd.*

7. (1931) A I R 1931 P C 186 (189) 130 Ind Cas 315 58 Ind App 29 10 Pat 407 (P C), *Nageshwar Bux Roy v. Bengal Coal Co. Ltd.*

See also Note 7 ante.

8. (1931) A I R 1931 P C 186 (188) 130 Ind Cas 315 58 Ind App 29 . 10 Pat 407 (P C), *Nageshwar Bux Roy v. Bengal Coal Co. Ltd.*

8a (1935) A I R 1935 Pat 33 (36) 13 Pat 517 156 Ind Cas 136, *Multaleshi Patani v. Midnapore Zamindary Co. Ltd.*

8b (1935) A I R 1935 Pat 33 (36) 13 Pat 517 156 Ind Cas 136, *Multaleshi Patani v. Midnapore Zamindary Co. Ltd.*

**Arts. 142 & 144
Notes 54-56**

where the defendants wrongdoers, in assertion of their right to the minerals under a particular area of land, sank three pits at different points, two of these being half a mile distant from the third, selecting the places at their own discretion, brought plants on the land and erected bungalows for employees, it was held by their Lordships of the Privy Council that adverse possession of the whole mineral field under the area was established. Their Lordships observed:

"It is nothing to the purpose that the Company may not have worked any one pit for twelve years continuously, if for twelve years they have carried on operations in various parts of the mineral field. The fact that one pit in a mineral field is discontinued and another opened in a different part of the field, and that bores are sunk in likely places, is excellent proof of possession of the whole area."⁹

55. Possession of person who could not advance a hostile title.—It has been seen in Note 16 *ante*, that adverse possession necessarily implies a possession in *denial of the title* of the true owner. It follows that where the wrongdoer is not *permitted* by law to advance any hostile title to the true owner, his possession cannot be adverse to the true owner.¹ It is a general principle of law, as has been seen in Note 18 *ante*, that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another title, and that his possession will not therefore be adverse to the person in whom such other title is vested. It is on this principle that the possession of one co-owner is not adverse to the other co-owners (see Note 35), and the possession of a trustee is not adverse to the *cestui que trust* (see Note 46). See also Notes 80 and 81 *infra*.

56. Permissive possession.—A permissive possession is not one in denial of the title of the true owner and is consequently not adverse to the true owner. It will not enable the possessor to obtain a title by adverse possession.¹ The mere fact that the document

9. (1931) A I R 1931 P C 186 (188, 189) : 130 Ind Cas 315 : 58 Ind App 29 : 10 Pat 407 (P C), *Nageshwar Bux Roy v. Bengal Coal Co. Ltd.*

Note 55

1. (1939) A I R 1938 Nag 335 (347) : 177 Ind Cas 6 (F B), *Asaram v. Ludheshwar*.

Note 56

- 1 (1934) A I R 1934 P C 67 (68) : 12 Rang 238 : 147 Ind Cas 328 (P C), *Lim Charlie v. Official Receiver*.

- (1934) A I R 1934 P C 77 (81) : 147 Ind Cas 887 : 61 Ind App 50 : 56 All

1 : 80 Ind Cas

113 : 2 Cal L
ar 788 (P C),

- (1933) A I R 1933 Cal 102 (109) : 140 Ind Cas 799, *Zamuddin Hussain v. Md. Abdur Rahim*.

- (1936) A I R 1936 Lab 673 (674) : 160 Ind Cas 1033, *Mohammad Yalub v. Abdul Karim*.

granting the permission is not valid, will not make the possession other than permissive.²

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Note 56

Possession is, however, *prima facie* adverse,³ and therefore the burden of proving permissive possession is upon the party alleging the same.⁴ It is not necessary that the permission should be *express*. It may be implied from the facts and circumstances of the case.

- (1926) A I R 1926 Oudh 353 (355) . 94 Ind Cas 779, *Ahmad Shariff v. Umrao Beg* (Defendant proved to be in permissive possession. Plaintiff entitled to possession though he failed to establish the contract of tenancy set up by him)
- (1918) 18 Ind Cas 367 (368) (Oudh), *Nandi v. Bagar Hussain*. (Possession of a Muhammadan widow under an arrangement—Held permissive)
- (1892-96) 2 Upp Bur Rul 363 (364), *Maung Lin v. Maung Shwe Thaw*
- (1898) 1898 Bom P J 36, *Gurangauda v. Basava*.
- (1930) A I R 1930 Bom 84 (95) . 53 Bom 792 123 Ind Cas 481, *Gujrat Ginning and Manufacturing Co v. Motilal Hirabhai Spinning & Weaving Co*. (Agent of plaintiff permitting defendant to build upon plaintiff's site)
- (1929) A I R 1929 All 808 (808,809) : 118 Ind Cas 709, *Mt. Ajaib v. Noor Khan*.
- (1915) A I R 1915 All 87 (87) 28 Ind Cas 622, *Bachcha v. Shiam Lal*. (Plying *tazia* in a particular land by consent)
- (1933) A I R 1933 Cal 539 (541) 146 Ind Cas 427, *Brajendra Kishore v. Iswar Kaibarta*
- (1930) A I R 1930 Cal 586 (587) 128 Ind Cas 244, *Jadav Chandra v. Akur Chandra*
- (1915) A I R 1915 Nag 29 (32) : 34 Ind Cas 471 . 12 Nag L R 75, *Narsing Das v. Ratanlal*.
- (1920) A I R 1920 Oudh 30 (30) . 54 Ind Cas 261, *Rameshwar Bakshi Singh v. Dwaraka*. (The fact that the licensee has improved buildings on the land or has replaced erections would not confer such a title upon him.)
- (1927) A I R 1927 Oudh 206 (207) . 102 Ind Cas 26, *Thakur Prasad v. Thomkinson*
- (1890) 3 C P L R 160 (160), *Durga Patel v. Atmaram Poular*
- (1936) A I R 1936 Pesh 217 (229) 169 Ind Cas 230, *Sujan Singh v. Secretary of State*
- (1870) 13 Suth W R 344 (344) 5 Beng L R App 12, *Asfar v. Ram Manick Roy*
- (1915) A I R 1915 Nag 119 (121) 11 Nag L R 126 31 Ind Cas 307, *Narain v. Bihari*.
2. (1925) A I R 1925 Mad 1279 (1290) 91 Ind Cas 565, *Ramanujacharyulu v. Mangarao*.
3. (1913) 21 Ind Cas 765 (767) (Mad), *Rompicherla v. Shaik Ismail Sahib*.
- (1912) 15 Ind Cas 146 (151) (Mad), *Ambalavana Chetty v. Singaratelu Odayar*.
- (1932) A I R 1932 Oudh 135 (136) 135 Ind Cas 689, *Indar Gir v. Special Manager, Court of Wards, Balrampur Estate*.
- (1928) A I R 1928 Lah 959 (959) 113 Ind Cas 145, *Mamman v. Kallumal*.
4. (1920) A I R 1920 Lah 475 (475), *Mir Mahfuz Ali v. Mt. Mahomed Zaman Begam*
- (1911) 11 Ind Cas 777 (777) (Low Bur), *M. Mynt v. U Chang*
- (1929) A I R 1929 Rang 153 (154) 7 Rang 85 117 Ind Cas 591, *U Maung Gyi v. Maung On Bwin*
- (1887) 11 Bom 221 (221) (Note b), *Vithoba v. Narayan*
- (1900) 2 Bom L R 410 (411), *Basappa v. Basappa* (Possession is evidence of title, and is primarily exclusive. It is for him who impugns the exclusive title to show that the possession originated in some way which has preserved his own right)
- (1933) A I R 1933 Nag 112 (118, 114) 29 Nag L R 42 144 Ind Cas 696, *Jai Krishna v. Babu*.

Thus, a tenant of a Zamindar occupying adjoining vacant land of the Zamindar for purposes ancillary to agriculture will be deemed to be in such occupation with the implied permission of the Zamindar.⁵ The question whether a possession is permissive or otherwise is one of fact depending upon the circumstances of the particular case.⁶

Where possession is proved to be in its origin permissive, it will be presumed that it continued to be of the same character until and unless something occurred to make it adverse.⁷ The onus is on the permissive occupant to show when and how his possession became adverse.⁸ In order to discharge this there must be clear and affirmative evidence to establish the change in the character of possession.⁹ There must be an open and explicit disavowal and disclaimer brought

(1929) A I R 1929 Rang 170 (171) : 120 Ind Cas 662, *Maung Ba Than v. Maung Sein Win*.

See also Note 57 infra.

5. (1923) A I R 1923 All 140 (140) : 41 All 726 : 77 Ind Cas 140, *Bhoj Raj v. Har Deva*.

[See also (1917) A I R 1917 All 182 (183) 41 Ind Cas 618, *Puttu Mal v. Bharat Indu*.

(1915) A I R 1915 All 312 (312) : 29 Ind Cas 264, *Padarath Tewari v. Bas Singh*.

(1930) A I R 1930 Lah 384 (385) : 190 Ind Cas 602, *Sundar Das v. Md. Akram Khan*.]

6. (1922) A I R 1922 Oudh 152 (155) : 66 Ind Cas 461, *Maqbul Ahmad v. Farhat Ali*. (Permissive possession is a question of legal inference to be drawn from the particular circumstances of the case.)

As to instances of permissive possession, see the undermentioned cases also :

(1929) A I R 1929 All 883 (884, 885) : 122 Ind Cas 737, *Kasim Abbas v. Hans Ram*. (Possession of parti plot of land by ryot is not adverse but permissive.)

..... v. Chaganlaka,
..... Phal Singh v.
..... s not adverse)

..... v. Dholu Rai.
..... Vishan Singh v.

..... the abadi of a
village and occupied it for over twelve years, is not sufficient to
establish a title against a zamindar by adverse possession.)

7. (1928) A I R 1928 Cal 582 (583) : 117 Ind Cas 532, *Monmotha Nath v. Deepin Behary*.

(1922) A I R 1922 All 411 (412) : 77 Ind Cas 107, *Jethu Misur v. Godawari Dutt*.

(1909) 12 Suth W R 167 (168), *Khuruchdharree Singh v. Rewatlall Singh*.

(1926) A I R 1926 Sind 71 (73) : 90 Ind Cas 1007 : 21 Sind L R 185,
.....

..... Ind Cas 230, *Sujan*
..... licensee can never

8. (1870) 2 N W P H C R 16 (17), *Wahee-ood-Deen v. Jhungore*.

(1909) 1 Ind Cas 806 (806) (Mad), *Nataraja Iyer v. Subramania Iyer*.

(1920) 38 Mad L Jour 15 (15) (Jour). (Critical note on 41 All 609; A I R 1919 All 403, *Jaichand v. Girwar Singh*.)

(1919) A I R 1919 Mad 215 (216) : 53 Ind Cas 161, *Venkatatubla Row v.*

.....
..... Bhaigalal
..... v. Sidik.

9. (1868) 2 N W P H C R 16 (17), *Wahee-ood-Deen v. Jhungore*.

to the knowledge of the owner.¹⁰ The mere fact of long user¹¹ by the permissive occupant is not sufficient to alter the character of the permissive possession into an adverse one. Where the defendant had been let into possession even during the minority of the plaintiff, and the latter filed his suit more than seventeen years after he attained majority, it was held that the plaintiff was entitled to succeed if the defendant failed to show that the character of his possession had become adverse to the plaintiff more than twelve years before suit.¹²

Where the possession by the defendant of a *portion* of certain property is shown to be permissive, it may be presumed that the possession of the other portions of the property also was permissive in the absence of evidence to the contrary.¹³

Where the possession of the defendant is *at the start* adverse to the plaintiff, it cannot, by virtue of subsequent events, become a permissive one.¹⁴

A suit against a person who entered on the property with the permission of the plaintiff, but whose possession has become adverse to the plaintiff, would be governed by Article 144 and not Article 142, inasmuch as the original entry of the defendant was not in contravention of the plaintiff's title and there was no dispossession or discontinuance of possession by the plaintiff.¹⁵

57. Possession of agents, servants, etc.—If a person enters into possession as agent of another and on his request, his possession cannot be treated as that of an owner or as an independent possession.¹ His possession is really, in law, the possession of the

(1921) A I R 1921 Oudh 124 (125) 63 Ind Cas 294 24 Oudh Cas 155, *Mahendra Bahadur Singh v Chandrapal Singh* (The decision also seems to hold that a mortgagee's possession as such is permissive. It is submitted that this is not correct.—See Note 57, *infra*.)

(1933) A I R 1933 Cal 102 (108) 140 Ind Cas 799, *Zamuddin Hussain v. Md. Abdur Rahim*

[See also (1866) 4 Bom HC R App Cas 155 (163), *Radhabai v Shama*]

11. (1921) A I R 1921 All 294 (295) 63 Ind Cas 498, *Ramu Ghatia v. Hemanta Kumar Deb*

(1924) A I R 1924 Lah 315 (315) 71 Ind Cas 618, *Bhag Singh v. Ahushal Singh*

12 (1884) 1894 Pun Re No 91, *Bela Singh v. Buta*

13. (1927) A I R 1927 Oudh 592 (584) 101 Ind Cas 730, *Ram Abhulal v. Chauvansi*

[See also (1930) A I R 1930 Lah 437 (437) 129 Ind Cas 889, *Allaha Ditta v. Budha* (X at first in permissive possession of a portion of the area—His absorption of the rest is not adverse)]

14. (1929) A I R 1929 Pat 117 (121) 8 Pat 549 115 Ind Cas 699, *Bageswari Charan Singh v. Jagannath Kauri*

15 (1933) A I R 1933 Cal 102 (108) 140 Ind Cas 799, *Zamuddin Hussain v. Md. Abdur Rahim*

Note 57

1. (1935) 159 Ind Cas 322 (324) (P C), *Bikrama Das v. Gomati Das*.

**Arts. 142 & 144
Note 57**

principal.² And so long as the agency continues, the character of the agent's possession is not altered. Thus, where a person starts managing the property of a minor as his agent and continues to manage the same even after the minor has become a major, he cannot acquire a title to the property by adverse possession, although he continues to be in possession for more than twelve years after the minor attains majority.³ It has been held in the undermentioned cases⁴ that the possession of an agent is *permissive*. It is submitted that this view does not seem to be correct. An agent's possession is *on behalf* of the principal, while a permissive possession is one which a person enjoys on *his own behalf* though with the permission of another.

An agency may be express or implied, and hence where the possession of a person can be traced to an implied agency, such possession cannot be treated as adverse.⁵ Thus, where a Buddhist father on his remarriage made over the land in suit to his four children by the first wife by a registered deed towards their mother's share of inheritance in full satisfaction thereof, but himself continued to be in possession and managed the land for the joint benefit of all, it was held that the possession of the father was not adverse to his children but only as agent and manager for the benefit of all the co-owners.⁶ On the same principle, where a person who is the only male member in the family manages the property on behalf of his brother's widow, his possession is not adverse to the widow.⁷ Similarly, the possession of a managing member of a joint Hindu family

(1892) 1892 Bom P J 101, *Ramray Dharamray v. Ganesh Ramchandra*.

(1868) 1868 Pun Re No. 104, *Ahmed Yar v. Shah Buksh*.

(1929) A I R 1929 All 541 (542) : 114 Ind Cas 893, *Girdhari v. Jodha*.

(1933) A I R 1933 Lah 786 (789) 149 Ind Cas 509, *Hussain Ali Shah v. Sardar Ali Shah*.

[See also (1876) 1876 Bom P J 59, *Rango v. Collector of Nasik*. (Person though having right in himself accepting agency from another cannot plead adverse possession against the latter.)

(1875) 23 Suth W R 93 (94), *Azim Ali Khan Bahadur v. Surussutty Debia*. (Where an agent holds the lands of two principals and one of them claims the land of the other by adverse possession

2. (1871) L R 12 Eq 149 (151, 152) : 40 L J Ch 775, *Williams v. Pott*.

See also Note 11, *ante*.

3. (1894) 1894 Pun Re No. 94, *Bela Singh v. Buta*.

4. (1926) A I R 1926 Nag 286 (287) 92 Ind Cas 164. 27 Cri L Jour 212, *Bajirao v. Mt Dadibai*.

(1904) 9 Cal W N 663 (670), *Jogendra Nath Singh v. Kalicharan Roy*.

5. (1868) 1868 Pun Re No. 104, *Ahmed Yar v. Shah Buksh*.

6. (1925) A I R 1925 Rang 13 (15) : 105 Ind Cas 593. 5 Rang 576, *Maung Aung Tun v. Maung San Nyun*.

7. (1924) A I R 1924 Bom 469 (469) : 87 Ind Cas 705, *Kallappa Mallappa v. Kallappa Nungappa*.

(1893) 13 Cal L R 329 (329), *Asad Ali Mardha v. Toyfari Bibi* (Where a female lives with her male relatives, the ordinary presumption is that they manage her property for her, and do not hold it adversely.)

is by and on behalf of the family as agent and cannot be treated as adverse to the other members of the family.⁸

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Note 57

Where, however, the agency has terminated, as for instance, by the agent's dismissal, the possession of the erstwhile agent thereafter is not on behalf of the principal but on his own account.⁹ It is also open to the agent after an open and notorious disavowal of the agency to acquire a title by prescription.¹⁰ The repudiation of the agency should, however, be *distinct*¹¹ and to the *knowledge of the principal*,¹² and accompanied by some *overt act* which would amount to an active assertion of an adverse right.¹³ An agent cannot by a mere wish or volition change the character of his possession.¹⁴

Where the agent trespassed into another man's property, it was held in the undermentioned case¹⁵ that such trespass on his part was an individual act, and that unless there was clear and cogent evidence to show that the trespass had been committed by the agent in the interest of the principal, it could not be held that the latter was in any way benefited by such trespass.

The principles discussed above apply also to the case of a possession by a servant, which is only on behalf of the master.¹⁶

(1917) A I R 1917 Pat 393 (391) 41 Ind Cas 39, *Jagu Mandal v. Madhab Mandal*. (The possession of the male members of the propositus family where the daughter was entitled to the property of her father governed by Dayabhaga School must be presumed to be on behalf of the daughter.)

[See also (1906) 1906 Pun L R No 89 (93) 1906 Pun Re No. 88, 1908 Pun W R No. 74, *Mt Dhan Devi v Kanshs Ram*

(1876) 25 Suth W R 439 (442), *Sait Abdool Ali v Mt. Kulsum*, (Mahomedan brother managing his sister's property.)]

8. (1873) 20 Suth W R 330 (331), *Umbika Soonduree Dossee v Shama Churn Goocho*

[See also (1865) 2 Suth W R 181 (181), *Mahomed Mudun v Khode* for

29

10 (1918) A I R 1918 Mad 183 (190) 44 Ind Cas 630, *Raman Somayajipad v Kunhu Kutti Korillamma*

(1893) 16 Mad 456 (459), *Santharan v Krishna*

11. (1893) 17 Bom 755 (758), *Savad Alamkhan v Yasinkhan*.

12 (1931) 1931 Mad W N 856 (956), *Lakshminarayana Narada v Madappa*

13 (1905) 7 Bom L R 836 (841), *Raghunathji Mulchand v. Varjandas Madhaiji*

(1916) A I R 1916 Bom 68 (76) 39 Ind Cas 552 41 Bom 315, *Laxmipati-rao v Venkatesh*

(1911) A I R 1914 Bom 296 (297, 298) 21 Ind Cas 763 (764) 33 Bom 53, *Krishna Dixit v Bal Dixit* (Held, mere withholding of rent for 2 or 3 years does not necessarily amount to an overt act)

14 (1884) 12 Bom 322 (324), *Mulji Bhulabai v Manchar Ganesh*.

(1901) 8 Bom L R 673 (675), *Pemraj Chandrabhan v Shripat Narayan*. (Execution of a will by the manager is not sufficient)

15. (1937) A I R 1937 Lah 552 (556) 1 L R (1937) Lah 276 172 Ind Cas 37, *Zaffar Hussain v. Mahomed Ghousd In*

[See also (1887) L R 18 Q B D 796 (814) 56 L J Q B 303, *Lyell v Kennedy*]

16. (1888) 12 Bom 322 (324), *Mulji Bhulabai v Manchar Ganesh*.

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Note 57

principal.² And so long as the agency continues, the character of the agent's possession is not altered. Thus, where a person starts managing the property of a minor as his agent and continues to manage the same even after the minor has become a major, he cannot acquire a title to the property by adverse possession, although he continues to be in possession for more than twelve years after the minor attains majority.³ It has been held in the undermentioned cases⁴ that the possession of an agent is *permissive*. It is submitted that this view does not seem to be correct. An agent's possession is *on behalf* of the principal, while a permissive possession is one which a person enjoys on *his own behalf* though with the permission of another.

An agency may be express or implied, and hence where the possession of a person can be traced to an implied agency, such possession cannot be treated as adverse.⁵ Thus, where a Buddhist father on his remarriage made over the land in suit to his four children by the first wife by a registered deed towards their mother's share of inheritance in full satisfaction thereof, but himself continued to be in possession and managed the land for the joint benefit of all, it was held that the possession of the father was not adverse to his children but only as agent and manager for the benefit of all the co-owners.⁶ On the same principle, where a person who is the only male member in the family manages the property on behalf of his brother's widow, his possession is not adverse to the widow.⁷ Similarly, the possession of a managing member of a joint Hindu family

(1892) 1892 Bom P J 101, *Ramrav Dharamrav v. Ganesh Ramchandra*.

(1868) 1868 Pun Re No. 104, *Ahmed Yar v. Shah Buksh*.

(1929) A I R 1929 All 541 (542) : 114 Ind Cas 893, *Girdhari v. Jodha*.

(1933) A I R 1933 Lah 786 (789). 149 Ind Cas 509, *Hussain Ali Shah v. Sardar Ali Shah*.

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(1875) 23 Suth W R 93 (94), *Azim Ali Khan Bahadur v. Surussutty Debia*. (Where an agent holds the lands of two principals and one of them claims the land of the other by adverse possession through the possession of the agent of such land, he must prove that such adverse claim has been brought to the notice of the other and that the agent has been holding his land adversely to such other.)]

2. (1871) L R 12 Eq 149 (151, 152) : 40 L J Ch 775, *Williams v. Pott*.

See also Note 11, *ante*.

3. (1884) 1884 Pun Re No. 94, *Bela Singh v. Buta*.

4. (1926) A I R 1926 Nag 286 (287) : 92 Ind Cas 164. 27 Cri L Jour 212, *Dajirao v. Mt. Dadiba*.

(1904) 9 Cal W N 663 (670), *Jogendra Nath Singh v. Kalicharan Roy*.

5. (1868) 1868 Pun Re No. 104, *Ahmed Yar v. Shah Buksh*.

6. (1929) A I R 1928 Rang 13 (15) : 105 Ind Cas 598 : 5 Rang 576, *Maung Aung Tun v. Maung San Nyun*.

7. (1924) A I R 1924 Bom 469 (469) : 87 Ind Cas 705, *Kallappa Mallappa v. Kallappa Mallappa*.

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 s that

"They are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can by mere assertion in a judicial proceeding and the lapse of six or twelve years, without that assertion having been successfully challenged, obtain a title as an under-proprietor to the land."

The mere non-payment of rent or discontinuance in the payment of rent cannot by itself create an adverse possession.⁵

See also Notes 12 and 13 to Art. 139 *ante* for a fuller discussion.

59a. Encroachment by tenant. — Where a tenant encroaches on land which adjoins his holding and which belongs to the same landlord, the possession by the tenant of the land so encroached upon would be adverse to the landlord.¹ The right acquired by the tenant by such adverse possession for the statutory period would depend on the nature of the right in assertion of which the adverse possession was held. Thus, where the tenant was in adverse possession claiming an absolute right in the land, he would acquire by prescription an absolute title to the land.² But where the tenant merely claims to be a *tenant* of the land, he can acquire only a tenancy in the land.³ The general presumption is that the tenant only claims the additional land as part of his holding. Hence, unless some act is proved on his part which shows that his intention was to assert an absolute title to the land, it will be presumed that he only asserted a right to a limited interest in the land as forming part of his tenancy.⁴ In *Gooroodas Roy v Issur Chunder Bose*,⁵ Markby, J. observed as follows "We think the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure, and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act

5 (1922) A I R 1922 P C 272 (276) 49 Ind App 399 2 Pat 38 71 Ind Cas 984 (P C), *Jagdeo Narain Singh v Baldeo Singh* (40 Cal 173, Approved)

Note 59a

1. (1929) A I R 1929 Pat 624 (626) 117 Ind Cas 636 *Pramathan Singh v Chathu Sahu*
2. (1926) A I R 1926 Cal 883 (885) 95 Ind Cas 622, *Devendra Narayan v Jhumur Pramanish*
3. (1926) A I R 1926 Cal 634 (636) 92 Ind Cas 963, *Gopal Chandra v Satya Bhanu*.
- (1930) A I R 1930 Cal 579 (583) 127 Ind Cas 763 57 Cal 871, *Mulatalesha Das v. Manish Jana*.
- (1905) 2 Cal L Jour 125 (135), *Ishan Chandra Mitter v Raja Ramranjan*
- (1926) A I R 1926 Cal 883 (885) 95 Ind Cas 622, *Devendra Narayan v Jhumur Pramanish*.
- (1911) 10 Ind Cas 575 (576) : 35 Mad Cls, *Muthurathu Thein v Robert Gordon Orr*.
- (1926) 2 Cal L Jour 125 (135), *Ishan Chandra Mitter v Raja Ramranjan*
- 22 Satb W R 246 (247)

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Notes 58-59

58. Possession by husband or wife.—Where a man and his wife are living together, and the husband is in possession of the wife's property, his possession must be considered to be on behalf of his wife and not adverse to her.¹ In such a case, the husband is presumed to be the *agent* of his wife.² On the same principle it has been held that where a Mahomedan sells to his wife certain property in lieu of her *mehr* (dower) but himself continues in possession thereof, his possession is on behalf of his wife and not adverse to her.³

It follows from what has been said above that where the husband and wife are in *joint possession*, no question of adverse possession can arise as between them.⁴

A wife, who holds possession on behalf of her husband during his absence, cannot, on the same principle, acquire a title by adverse possession against the husband.⁵

59. Possession of tenant.—As has been seen in Note 12 to Article 139, a tenant's possession is not adverse to his landlord.¹ The reason is that a tenant cannot dispute his landlord's title so long as he remains in possession under an agreement which he made with him.² In *Muhammad Mumtaz Ali Khan v. Dhanna Singh*,³ their Lordships of the Privy Council affirmed the observation they had made in *Muhammad Mumtaz Ali Khan v. Mohan Singh*⁴ to the following effect :

- (1869) 11 Suth W R 333 (334), *Meher Ali v. Golam Nuzuff*. (Possession held by a servant under a decree which reserves master's right to dismiss him.)
 (1878) 1878 Bom P J 186, *Ramachandra v. Gunwantrao*.

Note 58

1. (1875) 24 Suth W R 274 (275), *Sooda Ram Doss v. Joogul Kishore Gupto*.
- (1868) 9 Suth W R 153 (153), *Abdool Ali v. Kurrunnissa*. (Suit by a Mahomedan for possession of property.)
2. (1876)
3. (1916) A I R 1916 Bom 159 (161, 162) : 41 Bom 5 : 36 Ind Cas 715, *Ibrahim Bhura Jamnu v. Isa Rasul Jamnu*.
4. (1928) A I R 1928 Nag 275 (276) : 108 Ind Cas 435, *Mayadad Khan v. Hazari Lal*.
5. (1878) 4 Cal 327 (329) : 2 Shome L R 106, *Dejoy Chunder Banerji v. Kally Prosonno Mooherry*.

Note 59

1. (1902) 25 Mad 507 (511) : 12 Mad L Jour 119, *Seshamma Shettati v. Chukkaya Hegade*.
- (1873) 20 Suth W R 398 (399), *Bungaray Bhookta v. Megh Lall Pooree Gossain* (The possession of a sub-lessee of the tenant cannot be adverse to the superior landlord.)
- (1928) 117 Ind Cas 812 (845) : 32 Cal W N 720 (723), *Dejoy Chand v. Sukumar Das*.
- (1872) 18 Suth W R 443 (444), *Lakhoo Khan v. Wase*.
- (1891) 8 Cal 79 (81) : 10 Cal L R 113 : 9 Cal L R 173, *Kasimunnissa Bibi v. Nitruffon Doss*.
2. (1935) A I R 1935 P C 59 (61) : 154 Ind Cas 945 (P C), *Chandrika Prasada v. B B & C. I Ry Co*.
3. (1929) 121 Ind Cas 590 (532) : 59 Mad L Jour 226 (228) (P C).
4. (1923) A I R 1923 P C 118 (121) : 50 Ind App 202 : 26 Oudh Cas 231 : 45 All 419 : 74 Ind Cas 476 (P C)

"They are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can by mere assertion in a judicial proceeding and the lapse of six or twelve years, without that assertion having been successfully challenged, obtain a title as an under-proprietor to the land."

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Notes 59-59a**

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See also Notes 12 and 13 to Art. 139 *ante* for a fuller discussion.

59a. Encroachment by tenant. — Where a tenant encroaches on land which adjoins his holding and which belongs to the *same* landlord, the possession by the tenant of the land so encroached upon would be adverse to the landlord.¹ The right acquired by the tenant by such adverse possession for the statutory period would depend on the nature of the right in assertion of which the adverse possession was held. Thus, where the tenant was in adverse possession claiming an absolute right in the land, he would acquire by prescription an absolute title to the land.² But where the tenant merely claims to be a *tenant* of the land, he can acquire only a tenancy in the land.³ The general presumption is that the tenant only claims the additional land as part of his holding. Hence, unless some act is proved on his part which shows that his intention was to assert an absolute title to the land, it will be presumed that he only asserted a right to a limited interest in the land as forming part of his tenancy.⁴ In *Gooroodas Roy v Issur Chunder Bose*,⁵ Markby, J observed as follows "We think the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure, and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act

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Note 59a

- 1 (1929) A I R 1929 Pat 624 (626) 117 Ind Cas 636 *Hamlakhian Singh v Chathu Sahi*
- 2 (1926) A I R 1926 Cal 833 (885) 95 Ind Cas 622, *Devendra Narayan v Jhumur Pramanik*.
- 3 (1926) A I R 1926 Cal 634 (636) 92 Ind Cas 963, *Gopal Chandra v Satya Bhanu*
(1930) A I R 1930 Cal 579 (583) 127 Ind Cas 763 57 Cal 371, *Mukhtaleshi Das v Mansilal Jana*
(1905) 2 Cal L Jour 125 (185), *Ishan Chandra Mitter v Raja Ramranjan*
(1926) A I R 1926 Cal 883 (885) 95 Ind Cas 622, *Devendra Narayan v Jhumur Pramanik*.
4. (1911) 10 Ind Cas 575 (576) 35 Mad 618, *Muthuraku Thevan v Robert Gordon Orr*,
(1905) 2 Cal L Jour 125 (185), *Ishan Chandra Mitter v Raja Ramranjan*.
- 5 (1874) 22 South W R 246 (247)

Arts. 142 & 144
Notes 58-59

58. Possession by husband or wife.—Where a man and his wife are living together, and the husband is in possession of the wife's property, his possession must be considered to be on behalf of his wife and not adverse to her.¹ In such a case, the husband is presumed to be the *agent* of his wife.² On the same principle it has been held that where a Mahomedan sells to his wife certain property in lieu of her *mehr* (dower) but himself continues in possession thereof, his possession is on behalf of his wife and not adverse to her.³

It follows from what has been said above that where the husband and wife are in *joint possession*, no question of adverse possession can arise as between them.⁴

A wife, who holds possession on behalf of her husband during his absence, cannot, on the same principle, acquire a title by adverse possession against the husband.⁵

59. Possession of tenant.—As has been seen in Note 12 to Article 139, a tenant's possession is not adverse to his landlord.¹ The reason is that a tenant cannot dispute his landlord's title so long as he remains in possession under an agreement which he made with him.² In *Muhammad Mumtaz Ali Khan v. Dhanna Singh*,³ their Lordships of the Privy Council affirmed the observation they had made in *Muhammad Mumtaz Ali Khan v. Mohan Singh*⁴ to the following effect:

Note 58

1. (1875) 24 Suth W R 274 (275), *Sooda Ram Doss v. Joogul Kishore Guplo*.
 (1868) 9 Suth W R 153 (153), *Abdool Ali v. Kurrunnissa*. (Suit by a Mahomedan.)
2. (1916) A I R 1916 Bom 159 (161, 162) : 41 Bom 5 : 36 Ind Cas 715, *Ibrahim Bhura Jamnu v. Isa Rasul Jamnu*.
3. (1928) A I R 1928 Nag 275 (276) : 108 Ind Cas 495, *Mayadad Khan v. Hazari Lal*.
5. (1878) 4 Cal 327 (329) : 2 Shome L R 106, *Dejoy Chunder Banerji v. Kally Prosonno Moohorji*.

Note 59

1. (1902) 25 Mad 507 (511) : 12 Mad L Jour 119, *Seshamma Shettai v. Chichaya Hegade*.
- (1873) 20 Suth W R 393 (399), *Bungaraj Bhokhta v. Megh Lal Pooree Gossein*. (The possession of a sub-lessee of the tenant cannot be adverse to the superior landlord.)
- (1923) 117 Ind Cas 812 (815) : 32 Cal W N 720 (723), *Dejoy Chand v. Sukumar Dev*.
- (1872) 18 Suth W R 443 (444), *Lalahoo Khan v. Wase*.
- (1881) 8 Cal 79 (81) : 10 Cal L R 113 : 9 Cal L R 173, *Kasimunnissa Bibi v. Nadrutton Dose*.
2. (1935) A I R 1935 P C 59 (61) : 154 Ind Cas 915 (P C), *Chandrika Prasada v. B. B. & C. I Ry Co*.
3. (1929) 121 Ind Cas 530 (532) : 53 Mad L Jour 226 (229) (P C).
4. (1923) A I R 1923 P C 118 (121) : 50 Ind App 202 : 26 Oudh Cas 231 : 45 All 419 : 74 Ind Cas 476 (P C).

"They are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can by mere assertion in a judicial proceeding and the lapse of six or twelve years, without that assertion having been successfully challenged, obtain a title as an under-proprietor to the land."

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Notes 59-59a**

The mere non-payment of rent or discontinuance in the payment of rent cannot by itself create an adverse possession.⁵

See also Notes 12 and 13 to Art. 139 *ante* for a fuller discussion.

59a. Encroachment by tenant. — Where a tenant encroaches on land which adjoins his holding and which belongs to the same landlord, the possession by the tenant of the land so encroached upon would be adverse to the landlord.¹ The right acquired by the tenant by such adverse possession for the statutory period would depend on the nature of the right in assertion of which the adverse possession was held. Thus, where the tenant was in adverse possession claiming an absolute right in the land, he would acquire by prescription an absolute title to the land.² But where the tenant merely claims to be a *tenant* of the land, he can acquire only a tenancy in the land.³ The general presumption is that the tenant only claims the additional land as part of his holding. Hence, unless some act is proved on his part which shows that his intention was to assert an absolute title to the land, it will be presumed that he only asserted a right to a limited interest in the land as forming part of his tenancy.⁴ In *Gooroodas Roy v Issur Okunder Bose*,⁵ Markby, J. observed as follows: "We think the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure, and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act

5 (1922) A I R 1922 P C 272 (278) 49 Ind App 399 2 Pat 38 71 Ind Cas 934 (P O), *Jagdeo Narain Singh v Baldeo Singh*. (40 Cal 173, Approved)

Note 59a

- 1 (1929) A I R 1929 Pat 624 (626) 117 Ind Cas 636 *Itamihal Singh v Chathu Sahi*.
- 2 (1926) A I R 1926 Cal 883 (885) 95 Ind Cas 622, *Devendra Narayan v Jhumur Pramanik*.
- 3 (1926) A I R 1926 Cal 634 (636) 92 Ind Cas 963, *Gopal Chandra v Satya Bhanu*.
(1930) A I R 1930 Cal 579 (583) 127 Ind Cas 763 57 Cal 371, *Muktakeshi Das v Manilal Jana*.
(1905) 2 Cal L Jour 125 (135), *Ishan Chandra Mitter v Raja Ramranjan*.
(1926) A I R 1926 Cal 883 (885) 95 Ind Cas 622, *Devendra Narayan v. Jhumur Pramanik*.
- 4 (1911) 10 Ind Cas 575 (576) 35 Msd 618, *Muthuraku Thevan v. Robert Gordon Orr*.
(1905) 2 Cal L Jour 125 (135), *Ishan Chandra Mitter v v Raja Ramranjan*.
- 5 (1874) 22 Suth W R 246 (247)

Arts. 142 & 143 done at the time that the tenant made the encroachment for his own
Nota 59a benefit."

In order to confer on the tenant a right of *tenancy* by prescription in the land encroached upon by him, it is not necessary to show that he set up a right of tenancy in such lands, to the *knowledge of the landlord*.⁶ But it has been held that unless the tenant's claim to an absolute title to the encroached lands is made to the knowledge of the landlord, the tenant will acquire only a tenancy right in respect of such lands. The reason given is that as the tenant encroaches *prima facie* in his character as tenant, the landlord is entitled to treat him as such till he has notice of a repudiation of such character and an assertion of a hostile title.⁷

Where a tenant grazes cattle and cuts grass on the adjoining waste lands of his landlord, such acts would be presumed to have been done with the permission of the landlord inasmuch as the acts are such as would ordinarily be done by tenants on waste lands of their landlord without any objection by him. Hence, a tenant cannot claim to have been in adverse possession of the waste lands merely by reason of such acts.⁸

Where a tenant encroaches on land which adjoins his holding and which belongs to a person *other than his landlord*, the possession of such land by the tenant is adverse to the owner thereof. But such adverse possession enures to the benefit of the tenant's landlord, unless the tenant has shown clearly that he intended to hold the land for his own benefit.⁹

In *Whitmore v. Humphries*,¹⁰ Willes, J., observed as follows :

"By the rules of law applicable to this subject the landlord is entitled, at the determination of the tenancy, to recover from the tenant not only the land demised but also any land which the tenant may have added to it by encroachment from the waste, such encroachment being deemed to be made by him as tenant as an addition to the holding and consequently for the benefit of his landlord, unless it is made under circumstances which show an intention to hold it for his own benefit alone and not as a part of his holding under the landlord

"It is not confined to cases where the encroachment is upon land to which the landlord is entitled; it applies to cases where the land encroached upon does not belong to the landlord. It is held in such cases that as between the landlord and the tenant

6. (1911) 10 Ind Cas 575 (576) : 35 Mad 618, *Muthuraka Thevan v. Robert Gordon Orr*. (Dissenting from 31 Cal 397.)

7. (1905) 2 Cal L Jour 125 (135), *Ishan Chandra Mitter v. Raja Ramranjan*.

8. (1903) 31 Cal 397 (405), *Wali Ahmed Chowdhry v. Tota Meah*.

9. (1933) A I R 1933 Nag 112 (113) : 29 Nag L R 48 : 144 Ind Cas 696, *Jas Krishna v. Babu*.

(1936) 167 Ind Cas 897 (906) : 63 Cal 300, *Surendra Kumar Roy v. Ahmed Nawab Chowdhry*.

10. (1871) 41 L J C P 43 (46) : 20 W R (Eng) 79 : L R 7 C P 1 : 25 L T 496. (Quoted in 163 Ind Cas 877 (906).)

the tenant must *prima facie* be deemed to have taken the additional land as part of his tenancy and for the benefit of his landlord Arts. 142 & 144
Notes 89a-60

"There is often great temptation and opportunity afforded to the tenant to take in adjoining land which may or may not be his landlord's and it is considered more convenient and more in accordance with the rights of property that the tenant, who has availed himself of the opportunity afforded him by his tenancy to make encroachments, should be presumed to have intended to make them for the benefit of the reversioner, except under circumstances pointing to an intention to take the land for his own benefit exclusively."

Where a tenant encroaches on the adjoining land belonging to a person other than his landlord and attorns to such person, there is no adverse possession by the tenant and his original landlord cannot derive any benefit from his possession of such land ¹¹

60. Possession under invalid transaction. — Where a person takes possession of property under colour of a transfer which is inoperative, such possession is adverse to the true owner ¹ The reason is that in such cases the transferee gets no title under the transfer and his possession is therefore without title and in contravention of the title of the true owner Thus, where *A* executes an unregistered deed of gift in favour of *B* and puts *B* in possession of

11. (1936) 163 Ind Cas 897 (906) 63 Cal 300, *Surendra Kumar Roy v Ahmed Nawab Choudhry*

Note 60

1. (1866-68) 3 Mad H C R 5 (24), *Syed Ali Saib v Sri Raja Sanyasiraz Peddabaliyara Sindhulu Bahadur* (Possession under alienation in contravention of S. 8 of Regulation, 25 of 1802)
- (1909) 1 Ind Cas 663 (664) 33 Bom 116, *Adam Umar Sale v Bapu Bataji*. (Possession acquired under an alienation made in contravention of Section 8 of the Bhagdari Act, 1862)
- (1929) A I R 1929 Pat 117 (119, 120) 8 Pat 549 115 Ind Cas 699, *Bageswari Charan Singh v Jagannath Kuari*. (Grant in contravention of Section 12-A, Chota Nagpur Encumbered Estates Act (6 of 1876)—Yet title can be acquired by twelve years' adverse possession)
- (1933) A I R 1933 Bom 209 (214) 149 Ind Cas 464, *Sabara Yellappa v. Yamanappa Sabu* (Sale void on the ground of immoral consideration)
- (1900) 23 Mad 271 (279) 27 Ind App 69 4 Cal W N 329 10 Mad L Jour 29 2 Bom L R 597 7 Sar 671 (PC), *Gnanasambanda Pandara Sanadhi v Velu Pandaram*.
- (1934) A I R 1934 Oudh 449 (451) 152 Ind Cas 180, *Ram Dutt Singh v. Mohammad Nazir Khan* (Person acquiring possession under invalid title—Continuous possession for more than 12 years makes his title unassailable)
- (1878) 4 Cal 327 (330, 331) 2 Shome L R 106, *Bejoy Chunder Banerjee v Kally Prasanna Mukerjee* (Lease granted by unauthorised person—Possession of lessee is adverse to the real owner)
- (1937) A I R 1937 Oudh 165 (167) 164 Ind Cas 1003 12 Luck 316 *Gur Din Sah v Badi*. (Transferee of common property from one of several co-owners—Transferee's possession is adverse to the other co-owners)
- (1912) 15 Ind Cas 196 (201) 31 All 289 (P C) *Parbati v Muhammad Muraffar Ali Khan* (Possession under transfer by person not entitled to the property is adverse to the true owner)

**Arts. 142 & 144
Note 60**

the property in virtue of the gift, the possession by *B* is adverse to *A* from the date of his entering into possession.² Similarly, where *A* executes a sale deed in favour of *B* but the sale is void for want of lawful consideration, the possession of *B* under such sale is adverse to *A*.³ See the undermentioned cases⁴ for other instances.

(1925) A I R 1925 Mad 861 (866) : 87 Ind Cas 621, *Ghanshamdoss Narayandoss v. Saraswati Bai*. (Possession under void legacy is adverse to the heir of the testator)

(1926) A I R 1926 Oudh 431 (442) : 96 Ind Cas 47 : 26 Oudh Cas 176 : 2 Luck 507, *Jagdev Singh v. Deputy Commissioner Partabgarh*. (Do.)

(1924) A I R 1924 Bom 174 (176) : 48 Bom 166 : 82 Ind Cas 533, *Sangawa*

Ind Cas 1100 : 57 All 159 :

" *Leo Prasad Singh v. Karia*

Bharthi.]

2. (1924) A I R 1924 Pat 341 (342) : 73 Ind Cas 41, *Gayani Sahu v. Balchand Sahu*.

3. (1933) A I R 1933 Bom 209 (214) : 149 Ind Cas 464, *Sabava Yellappa v. Yamanappa Sabu*.

4. (1919) A I R 1919 P C 44 (47) : 43 Mad 244 : 46 Ind App 285 : 53 Ind Cas 901 (P C), *Varada Pillai v. Jeevarathnammal*. (Possession under void gift is adverse to the donor.)

(1929) A I R 1929 Pat 117 (120, 121) : 8 Pat 549 : 115 Ind Cas 699, *Bageswari Charan Singh v. Jagannath Kuari*. (Do.)

(1924) A I R 1924 Nag 222 (223, 224) : 79 Ind Cas 117, *Mt. Kasturi v. Baliram*. (Do.)

(1924) A I R 1924 Mad 800 (800) : 82 Ind Cas 67, *Narayanaswami v. Than-gavelu*. (Do.)

Iru v. Subbamma. (Do.)

: 927 : 1 Luck 33, *Secretary of*

(1911) 12 Ind Cas 225 (228) : 36 Bom 214, *Casamally v. Currimbhoy Ebrahim*. (Possession under void trust deed is adverse to the author of the trust.)

(1925) A I R 1925 Oudh 745 (746) : 89 Ind Cas 473, *Wajid Ali v. Mt. Salima Begam*. (Possession under void gift is adverse.)

(1918) A I R 1918 P C 180 (181) : 46 Cal 694 : 46 Ind App 60 : 50 Ind Cas 202 (P C), *Rani Kuar Mani Singh v. Nawab Bahadur of Murshidabad*. (Possession of purchaser under void sale is adverse to the true owner.)

(1925) A I R 1925 Pat 787 (795) : 4 Pat 394 : 92 Ind Cas 1034, *Mt. Jasoda Kuar v. Janak Misir*. (Do.)

(1918) A I R 1918 Oudh 457 (459) : 47 Ind Cas 694, *Sajjad Mirza v. Mt. Nanki Khanam*. (Do.)

(1926) A I R 1926 Oudh 141 (142) : 72 Ind Cas 99, *Mahipal Singh v. Sarjoo Prasad*. (Possession of vendee under unregistered sale deed is adverse to the vendor.)

(1930) A I R 1930 Bom 448 (449) : 127 Ind Cas 910, *Chhaganbhai v. Tulshibhai*. (Possession under void lease is adverse.)

(1923) A I R 1923 Bom 146 (147) : 77 Ind Cas 952, *Chaturbhai Lallubhai v. Motibhai Dapuji*. (Do.)

(1921) 64 Ind Cas 756 (757) (Cal), *Purna Chandra Das v. Joy Lal Payada*. (Do.)

(1926) A I R 1926 Lah 431 (432) : 94 Ind Cas 1000, *Isher Singh v. Wir Singh*. (Possession under deed of transfer executed by person not entitled to property is adverse to true owner.)

In the following cases⁵ it was held that the possession of the mortgagee under a void usufructuary mortgage was *permissive* and as such not adverse to the mortgagor. It is submitted that the decisions are not correct.

But, the person in adverse possession under an invalid transfer cannot, in every case, obtain *absolute* title to the property by being in such possession for the statutory period. The right acquired by him by such possession will only be the right purported to be transferred⁶. Thus, where a person enters into possession under a void mortgage, he can only acquire the right of a mortgagee by prescription⁷. Similarly, where a person enters into possession under a void lease, he can only acquire the right of a lessee by prescription^{7a}. So also, a person entering into possession as a trustee under a void trust deed acquires by prescription only the right of a trustee⁸.

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Note 60

- (1937) A I R 1937 Cal 88 (93) 41 Cal W N 896 (399) 169 Ind Cas 918, *Brajmohini Dassi v Sarala Devi* (Do)
- (1920) A I R 1920 Mad 598 (601) 43 Mad 436 56 Ind Cas 519, *Narasimha Rao v. Papanna* (Sale deed void owing to fraud on Registration law)
[See also (1911) 12 Ind Cas 362 (363) 35 Bom 439, *Sambhu Hanmanta v. Namanarayan*. (Vendee under an unregistered sale deed claiming a lien over the property in respect of mortgage discharged by him—Adverse possession commences after expiry of 12 years from date of the lien.)
- (1898) 21 Mad 169 (171) . 8 Mad L Jour 117, *Muniappan Chetty v. Muppi Nair* (Possession of Jenmi lands under cowle from Government is adverse to the Jenmi)]
5. (1928) A I R 1928 All 552 (552) 117 Ind Cas 831, *Mt Raj Rani v Gulab*
(1923) A I R 1923 All 191 (192) 79 Ind Cas 232, *Durga Chowdhary v Jagroop*.
(1929) A I R 1929 Nag 115 (116) 118 Ind Cas 57, *Sukhlal v. Disesar*.
6. (1930) A I R 1930 Oudh 75 (77) 124 Ind Cas 360, *Deputy Commissioner, Fyzabad v Bhaguan Din*. (Person holding possession of land of grantee adversely acquires same title as grantee by prescription and no more)
7. (1912) 16 Ind Cas 960 (960, 961) (Mad), *Sundara Gurukkal v. Subramania*.
(1928) A I R 1928 Mad 292 (290) 106 Ind Cas 891, *Bala Tripura Sundaramma v Secretary of State*.
(1897) 7 Mad L Jour 11 (12, 13), *Mamunhi v. Gri Sham Bhatta*
(1930) A I R 1930 Nag 26 (27) 118 Ind Cas 674, *Bhagana v Guman*.
(1903) 26 Mad 72 (73) 12 Mad L Jour 410, *Balkrishnamma Subudhi v Vinayaka Rawa Singh Bisoy*
(1930) A I R 1930 Mad 264 (265) 127 Ind Cas 139, *Somalinga L Rengier v. Ramia Santhu*
(1915) A I R 1915 Bom 102 (106) 39 Bom 359 . 28 Ind Cas 442, *Javerbhai v Gordhan Narsi*.
(1921) A I R 1921 Mad 410 (412) 44 Mad 946 . 64 Ind Cas 323, *Sontyana Gopala Dassee v Inapatlapula Rami*.
(1927) A I R 1927 All 811 (814) 100 Ind Cas 846, *Maha Manjral Rai v Aishen Kandu*.
(1935) A I R 1935 All 578 (579) 156 Ind Cas 813, *Shamrati Kuer v Katika Singh*.
(1933) A I R 1933 Pat 288 (290) 144 Ind Cas 439, *Abdul Jalbar v Gulab Khan*
- 7a. (1930) A I R 1930 Bom 448 (449) 127 I C 910, *Chhaganbhai v Tulshibhai*.
8. (1935) A I R 1935 All 458 (458) 157 I C. 1019, *Sheo Pershad v Karam Dur*.

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Note 60

In the undermentioned case^{8a} where *A* entered into possession of property as the adopted son of *B* and the adoption was invalid, it was held that *A* could not acquire by adverse possession any interest different from that which he would have taken if the property had rightly passed to him as the adopted son of *B*. In *Dalton v. Fitzgerald*,^{8b} the principle was stated as follows :

"If a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the will or deed, though it did not operate to pass the land in question and if he remains in possession till twelve years have elapsed and the title of the testator's heirs is extinguished, he cannot claim, by possession, an interest in the property different from that which he would have taken if the property had passed by the will or deed."

Where a transfer of property by *A* to *B* is good during the lifetime of *A* but void beyond his lifetime, the possession of *B* under such transfer would be adverse to *A*'s representatives after his death.⁹

Where property is transferred to a person for his life, the possession of his representative after his death will be adverse to the transferor.¹⁰

A leased certain property to *B* and then made a gift of the property to *C*, by means of an unregistered deed, and directed the tenant to pay the rent to the donee, *C*, in future. This was done and *C* received the rents from *B*, the lessee. It was held by the Madras High Court¹¹ that nevertheless, *C* could not be said to be in adverse possession against *A* until the expiry of the lease. It is submitted that the decision is not correct, as *C* clearly was in adverse possession of the landlord's right even before the expiry of the lease.

Where a transferee of property under a voidable transfer enters into possession, his possession is not adverse till the transfer is set aside.¹² But, in such cases, if a suit for setting aside the transfer is barred by limitation, a suit for possession also will be barred.¹³

[See (1910) 5 Ind Cas 931 (934) (Mad), *Venkatarama Murthi v. Narayanamma*.

(1928) A I R 1928 Cal 130 (134) : 105 Ind Cas 617 . 55 Cal 448, *Mt. Rukhya Banu v. Mt. Nasira Banu*]

8a (1924) A I R 1924 Nag 73 (74) . 78 Ind Cas 840, *Jageshwar v. Pandurang*.

8b (1897) 2 Ch 86 (93) . 66 L J Ch 604 : 76 L T 700 : 45 W R (Eng) 685.

9 : 48
sunt's
starts

(1936) A I R 1936 P C 183 (187) : 162 Ind Cas 465 : 63 Ind App 261 . 59
Mad 609 (P C), *Dattasikhamani Ponnambala v. Periyann Chetty*.

10. (1909) 4 Ind Cas 1006 (1006) (Lab), *Mt. Surjo v. Hira*.

11. (1900) 3 Ind Cas 122 (123) (Mad), *Acharath Rappan v. Mathummal Chettu*.

12. (1917) A I R 1917 Bom 235 (237) : 42 Ind Cas 904, *Shankerbhai Kashibhai v. Raisingji Jasuat Singji*.

13 (1911) 9 Ind Cas 377 (378) (Cal), *Sham Chandra v. Godadhar Mandal*.

Where a person enters into possession under a void transfer, the transfer need not be set aside before a suit for possession can be brought against him and so, although the period of limitation for a suit to set aside the transfer has expired, a suit for possession against the transferee will not be barred.¹⁴

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Where *A* transfers certain property to *B* under a void document and delivers possession of the property to him under such transfer, *A* "discontinues" possession within the meaning of Article 142 and therefore a suit for possession by *A* against *B* in such cases will come under that Article.¹⁵ The view held in certain decisions¹⁶ that Article 144 will apply to such cases is, it is submitted, not correct.

In the undermentioned case,¹⁷ *A* executed a benami document in favour of *B* and put the latter in possession of the property. *A* then sued *B* for possession. It was held by the Privy Council that Article 144 applied to the case. As *B*'s possession could not, at its inception, have been adverse to *A*, Article 142 could not apply.

60a. Possession under transfer which subsequently becomes invalid.—Where *A* transfers property to *B* and the transfer is valid until *A*'s life or until a certain contingency, *B*'s entry on such property cannot be said to be in contravention of the title of the person entitled to the property after *A*'s death or on the occurrence of the contingency. Nor can it be said that there is any dispossession or discontinuance of possession of such person by the transferee, though it may be discontinuance of possession on the part of *A*. A suit by the person entitled on *A*'s death or on the happening of the contingency

14. (1911) 9 Ind Cas 377 (378) (Cal), *Sham Chandra Dafadar v. Godadar Mandal*

(1919) A I R 1919 Low Bur 53 (55) 50 Ind Cas 324 9 Low Bur Rul 186, *Ma Nya Ma v. Aung Myat* (Sale by administrator without leave of Court—Right of heirs to treat sale as void is not extinguished by lapse of six years—Suit for possession within 12 years of sale is not barred)

15 (1925) A I R 1925 Lah 239 (239, 240) 84 Ind Cas 923, *Sadullah v. Suleman*

(1924) A I R 1924 Pat 341 (342) 73 Ind Cas 41, *Gayani Sahu v. Balchand Sahu*

(1898) 21 Mad 169 (171) 8 Mad L Jour 117, *Munappan Chetty v. Muzil Nayar*.

(1923) A I R 1923 Cal 13 (16) 72 Ind Cas 693, *Lalit Mohan Sen v. Maro-ranjan Ghose Choudhury*

(1932) A I R 1932 Cas 115 (116) 133 Ind Cas 102, *Ann Chandra Lau v. Ramanath Karmakar*

[See (1911) 9 Ind Cas 377 (378) (Cal), *Sham Chandra Dafadar v. Godadar Mandal*]

[See also (1923) A I R 1923 Cal 428 (429) 70 Ind Cas 869, *Dhyanara Krishna v. Mohendra Nath*]

16 (1937) A I R 1937 Oudh 521 (522) 171 Ind Cas 157 *Mt. Lachai v. Hayat Mohanmad* (Sale deed by minor is void ab initio—Minor can sue for possession directly—Suit is governed by Article 144 read with Section 6)

(1904) 26 All 346 (353) 1904 All W N 55 1 All I Jour 53 *Farida Inayat v. Masat Khan*

17. (1908) 85 Cal 551 (560) 35 Ind App 98 10 Bom I R 540 5 All I Jour 290 12 Cal W N 562 7 Cal L Jour 528 14 Bur I R 108 15 Mad L Jour 277 4 Mad L Tim 12 4 Low Bur R 120 (P.C.) *Letter Perumal Chetty v. Muniswamy Serru*

Arts. 142 & 144
Notes 60a-61

would be governed by Article 144, time running from the date of the death or the happening of the contingency as the case may be.¹

Where property of a person holding an estate for life therein is forfeited and sold by Government and is purchased by X, a suit by the person entitled after the death of the holder for life would be governed by Article 144.²

See also Note 79 *infra*.

61. Adverse possession of inalienable property.—There are certain cases in which an alienation of property is *prohibited* by law. Thus, under the Bombay Hereditary Offices Act, an alienation by a *watandar* of vatan property is not competent except for the life of the *watandar*. Similarly, under the Madras Hereditary Village Offices Act, 1895, an alienation of property attached to a village service *inam* is prohibited. The question has arisen whether in the case of such property a title can be acquired by *adverse possession* for the statutory period. Before the decision of the Privy Council in *Madhav Rao v. Raghunath*,¹ it had been held generally by the High Court of Bombay that such property could be acquired by adverse possession.² In *Madhav Rao v. Raghunath*,³ their Lordships of the Privy Council referring to the decision in *Radha Bai v. Anant Rao*,⁴ in

Note 60a

- 1 (1919) A I R 1919 Nag 52 (53) . 59 Ind Cas 473, *Mahomed Sirajuddin v. Fayazuddin*.
- (1913) 18 Ind Cas 611 (813) (All) *Gangasahas v. Kankaya Lal*. (Mortgage by widow with possession—If reversioner attacked the mortgage as invalid he should have, under Art. 144, sued within 12 years of the widow's death.)
- (1892) 1892 All W N 26 (27), *Murl v. Brij Lal*. (Transfer by occupancy tenant entitled only to be in possession for life.)
- (1925) A I R 1925 Oudh 307 (303) : 84 Ind Cas 237: 27 Oudh Cas 301, *Mahabir Prasad v. Ram Kumar*. (Sale by grove-holder—Subsequent relinquishment in favour of landlord—Suit by landlord to recover possession.)
- (1912) 16 Ind Cas 365 (367): 40 Cal 173, *Prosonna Kumar Moolerjee v. Srikantha Ray* (Ghatwal relinquishing his office after sale of his interest.)
- 2 (1932) A I R 1932 Lah 45 (46) : 131 Ind Cas 97, *Mehar Khan v. Sakhi Mahomed*.

Note 61

1. (1923) A I R 1923 P C 205 (210) : 47 Bom 793 : 50 Ind App 255 : 74 Ind Cas 362 (P C)
2. (1895) 9 Bom 193 (212) (P B), *Radhabai v. Anantrav Bhagant*.
(1893) 1893 Bom P J 30, *Ramgauda Hirgauda v. Gopal Sadashiv*.
(See also (1895) 10 Bom 34 (41), *Jamel Sahab v. Murgaya Swami*. (Assumed.)
(1888) 1888 Bom P J 46, *Lingangarda v. Chengarda*. (Do)
(1913) 17 Ind Cas 170 (171) 37 Bom 61, *Shivram Narasingrao v. Mahader Narayan*. (Do)
(1866) 4 Bom H O R App Cas 51 (54), *M. S. Sinde v. G. P. Sinde*. (Do.)
(1909) 4 Ind Cas 249 (250) : 34 Bom 401, *Narannha Krishnaji v. Varman Venkatesh*. (Joint watandars alienating—Limitation commences after death of both)
(1907) 7 Bom L R 135 (136), *Rama v. Shamrao*. (Do.))
3. (1923) A I R 1923 P C 205 (210) . 47 Bom 793 : 50 Ind App 255 : 74 Ind Cas 362 (P C)
- 4 (1855) 9 Bom 193 (212) (P B)

which a Full Bench had held that a stranger to the *watan* can acquire the property by adverse possession, observed as follows:

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"It is not necessary for their Lordships to decide in this case whether the answer of the Full Bench, limited as it must have been to the case of a stranger to the *watan*, setting up as a defence twelve years' adverse possession, was or was not correct, although they are constrained to say that it is somewhat difficult to see how a stranger to a *watan* can acquire a title by adverse possession for twelve years of lands the alienation of which was, in the interests of the State, prohibited."

Subsequent to the decision of the Privy Council above referred to, the Bombay High Court has, however, held that their Lordships of the Privy Council could not be considered to have overruled the decision of the Full Bench in *Radha Bai v. Anant Rao*,⁵ and that the decisions which had held that *watan* property could be acquired by adverse possession for the statutory period must still be considered good law.⁶ It has been held by the High Court of Madras, on the other hand, that property attached to a service *inam* cannot be acquired by adverse possession.⁷ According to the Patna High Court, a right of occupancy cannot be acquired in lands granted on police service tenure, by adverse possession for any length of time.⁸

Where, however, land is *not attached to an office*, in the sense in which lands granted to performance of a religious service in a temple are attached to a service, but has been granted for service, it becomes the hereditary property of the grantee. The conditions restraining alienation in such cases apply only as between him and the Crown. Such land may be acquired by adverse possession.⁹

61a. Adverse possession of land in military cantonments.

— It has been held in the undermentioned cases¹ that lands in

5. (1885) 9 Bom 198 (212) (F B)
6. (1931) A I R 1931 Bom 21 (28) 55 Bom 21 129 Ind Cas 145, *Tuka Lakhu v. Ganu Vithu*
(1932) A I R 1932 Bom 461 (466) 189 Ind Cas 223, *Swamirao v. Bhimabai*
7. (1935) A I R 1935 Mad 914 (916) 161 Ind Cas 447 59 Mad 51, *Ramalingam v. Veerabhadradu*
8. (1928) A I R 1928 Pat 603 (607) 7 Pat 366 109 Ind Cas 257, *Muti Dusadh v. Anu Mahto*.
9. (1917) A I R 1917 Mad 917 (947) 34 Ind Cas 898, *Dinabai Lakshminipati v. Pingali Narasimham*
(See also (1920) A I R 1920 Lah 209 (210) 55 Ind Cas 335, *Ghulam Mahamed v. Ahmad Khan* (Where a person holds adversely lands granted in perpetuity to an *ali* *lambardar*, the possession is adverse to the *ali* *lambardar* *in esse* and *in posse* and bars the title of the latter after the lapse of 12 years.)
(1934) 40 Mad L W 29 (29) (S N) (The period of time for acquiring a title by adverse possession to a Barber Service *inam* when the Government is not a party is 12 years and not 60 years.)

Note 61a

1. (1922) A I R 1922 AH 57 (59) 66 Ind Cas 582, *Secretary of State v. Mulla*.
(1911) 12 Ind Cas 117 (119) 88 Ind App 204 (216) 96 Bom 1 (P C) *Kashnuri Idarji v. Secretary of State*

Arts. 142 & 144 military cantonment area cannot be acquired by adverse possession. This view seems to be based on the general principle that a person cannot prescribe against a statute, that is to say, that where certain acts are prohibited to be done by statute, a person cannot by proof of such acts acquire a right by prescription.² The only position open to a person occupying land in cantonments which has not been specifically transferred by the Secretary of State, is the position of a licensee. It is not open to him to exercise acts of ownership, and consequently, he cannot acquire by such acts any right by adverse possession.³

61b. Adverse possession of rights not recognised by law.—

It is of the essence of a title by adverse possession that the right sought to be acquired must be one recognised by law. Where a person claimed by adverse possession a title to hold land as "a recognised subdivision" of a *bhag* or share in *narwa* governed by the Bombay Bhagdari and Narwadari Act, 5 of 1862, it was held by the High Court of Bombay that no such title was recognised by the law and that consequently no such title can be acquired by adverse possession.¹ A joint tenancy *with rights of survivorship* is recognised in Hindu law only in a coparcenary between members of an undivided Hindu family, and not in other cases. Such a status cannot therefore be acquired by adverse possession by a *stranger* to the family.² Similarly, a right of fishery by a person *as a member of the public* to fish in a non-tidal river is not recognised by law, and cannot therefore be acquired by adverse possession.³

62. Possession of owner, if can be adverse to himself. —

Normally a person cannot prescribe with regard to his own property.¹ But, under certain circumstances, the possession of a person may be adverse to himself. Thus, where *A* is in possession of his own land, but under a lease from *B* under the wrong impression that it belongs to *B* who asserts a title thereto, *A*'s possession would be *B*'s possession and consequently adverse to *A*. In *Secretary of State v. Krishnamoni Gupta*,² in which the facts were as stated above, their Lordships of the Privy Council observed as follows :

(1910) 8 Ind Cas 1096 (1097, 1098) (All), *Bank of Upper India v. Secretary of State*.

2. (1891) 39 W R (Eng) Digest Col. 253, *Trall v. M'Allister*.

3. (1922) A I R 1922 All 57 (59) : 66 Ind Cas 582, *Secretary of State v. Mulla*.

Note 61b

1 (1904) 23 Bom 399 (407) : 6 Bom L R 428, *Jethabhai v. Nathabhai*. (4 Bom L R 797, Relied on)

2 (1923) A I R 1923 Mad 11 (11) : 70 Ind Cas 653, *Rajambal Ammal v. Shanmuga Mudaliar*.

3. (1891) 2 Ch 678 (696) . 65 L T 175, *Smith v. Andrews*.

Note 62

1. (1906) 163 Ind Cas 347 (349) (Cal), *Sarafuddin Nur Ahmad v. Jibanness Khatoon*

2 (1902) 29 Ind App 104 (114) 29 Cal 518 : 4 Bom L R 337 : 6 Cal W N 617 : 8 Ear 269 (P C)

"It may, at first sight, seem singular that parties should be barred by lapse of time during which they were in physical possession and estopped from disputing the title of the Government (who was the adverse possessor in the case). But there is no doubt that the possession of the tenant is, in law, the possession of the landlord or superior proprietor and it can make no difference whether the tenant be one who might claim adversely to his landlord or not "

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Where *A* and *B* were co-owners of a certain property, and both of them were dispossessed by a third party, and subsequent thereto, one of the co-owners, *A*, came into possession of the property under a lease granted by the adverse possessor and so remained in possession for more than 12 years, it was held by the High Court of Calcutta that the title of both *A* and *B* was extinguished, inasmuch as the possession which *A* acquired must be referred to the title which *A* acquired under the lease and not to his title as co-owner of the property.³ *A*, *B* and *C* were joint owners of certain property. *A* usufructually mortgaged the whole property to *X* as his *self-acquired property*. Subsequently, *X* purchased *C*'s share in the property. More than 12 years after the purchase but within 12 years after the redemption of the mortgage by *A*'s heirs, *X* sued for possession of the one-third share purchased by him. It was held that the suit was barred,⁴ even though *X* was in possession of the share purchased from *C*. The reason is that *X*'s possession during his mortgage of *A* was only that of *A*, even though he had purchased a share of the property from *C*. It was therefore adverse to both *B* and *C* even from the date of the mortgage.

63. Possession must be continuous for the statutory period.—Adverse possession, in order to confer title to the property on the possessor, must be *continuous* for the statutory period.¹ This does not mean that proof of acts of possession must cover *every*

3 (1921) A I R 1921 Cal 616 (617) 35 Cal L Jour 164 (165) 64 Ind Cas 553, *Bhola Nath Das v Golabdas Sardar*. (Where a person holds a property adversely to both co-owners and one of them obtains possession under a lease granted by the adverse possessor and continues in possession for over 12 years, the title of the other co-owner is extinguished as the former's possession must be referred to his title under the lease.)

4 (1857) 14 Cal 674 (678), *Nundo Lal Addy v Jodu Nath Haldar*

Note 63

- 1 (1935) 42 Cal W N 1209 (1210), *Bhabani Prasanna v Manindra Chandra*.
(1920) A I R 1920 Oudh 215 (216) 57 Ind Cas 538, *Dan Bahadur Singh v Parthipal Singh*
(1911) 11 Ind Cas 185 (186) (Cal), *Shookoor Mallik v Lachari Lal*
(1866) 3 Mad H C R 99 (101), *Govindan Pillai v Chidambaram Pillai*
(1870) 2 N W P H C R 16 (17, 18), *Wahceowdeen v Jhunjore*
(1934) A I R 1934 Pat 485 (489) 154 Ind Cas 1032, *Ut Phareuchhna Kuari v Ramjad Kuari*.
(1918) A I R 1918 All 102 (104) 40 All 461 44 Ind Cas 900 *Debi Prasad v Badri Prasad*
(1923) A I R 1923 Lah 35 (36) 69 Ind Cas 363, *Lal Das v Chanda*

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moment of the requisite period.² "The fact of possession may be continuous though the several acts of possession are at considerable intervals. How many acts will infer this fact is a question of proof and presumption, independent of prescription."³

Where an owner is once shown to have been in possession, the presumption may be drawn under S. 114 of the Evidence Act that it continued till it is shown to have been interrupted.⁴ But, where a person is shown to have been in possession at a certain time and subsequently, there is no presumption that he must have been in possession before that date. The presumption of continuity is prospective rather than retrospective.⁵

64. Break in adverse possession, effect of. — As has been seen already, it is necessary in order to acquire a title by adverse possession that the possession of the wrongdoer must be continuous for the prescribed period of limitation.¹ It follows that where there is a break in the adverse possession of the wrongdoer, limitation ceases to run against the lawful owner of the property.² The leading case on the point is *Trustees, Executors, & Agency Co. v. Short*.³ In that case their Lordships of the Privy Council observed as follows :

"They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired a title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot

2. (1934) A I R 1934 P C 23 (25) : 147 Ind Cas 545 : 61 Ind App 78 : 61 Cal 262 (P C), *Secretary of State v. Khanna* 97, *Surendra Kumar Roy Chowd*
- (1935) 62 Cal L Jour 177 *Prasanna v. Manindra Chandra*.
- (1935) A I R 1935 Cal 760
3. Millar on Prescription page 36 cited in A I R 1934 P C 23 (25).
(1938) 42 Cal W N 1209 (1210 & 1211), *Bhabani Prasanna v. Manindra Chandra*.
4. (1914) 21 Ind Cas 818 (818) : 7 Sind L R 169, *Secretary of State v. Mush-tak Singh*.
5. (1927) A I R 1927 Nag 37 (37) : 97 Ind Cas 1006, *Tukaram Bajirao v. Tukaram Yeshwant*.

Note 64

1. (1920) A I R 1920 Cal 238 (239) : 57 Ind Cas 716, *Pyari Deyee Dabi v. Sakur Mandal*.
- (1931) A I R 1931 Pat 485 (489) : 151 Ind Cas 1032, *Mt. Dharichhna Kuari v. Ramyad Kuari*.
2. (1934) A I R 1934 Pat 485 (489), *Mt. Dharichhna Kuari v. Ramyad Kuari*.
(1925) A I R 1925 Cal 981 (983) : 85 Ind Cas 594, *Abhay Sankar v. Satyendra Prasanna*. (There can be no continuance of adverse possession when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation—The real owner does not discontinue his possession so long as the land is diluviated.)
- (1937) A I R 1937 Sind 132 (140) : 176 Ind Cas 549, *Takhtiram Tachchand v. Mt. Mural Jambhik*.
3. (1858) 37 W R (Eng) 433 (434) : 19 A C 793 . 58 L J P C 4 : 59 L T 677 : 53 J P 132

make an entry on himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant.

"There is not, in their Lordships' opinion, any analogy between the case supposed and the case of successive disabilities mentioned in the statute. There the statute continues to run because there is a person *in possession in whose favour it is running*.

"There is no direct authority on the point in this country. But such authority, as there is, seems to be opposed to the doctrine laid down by the Supreme Court. It is sufficient to refer to *McDonnell v. McKinty*,⁴ Lord St. Leonards' Real Property Statutes, page 31, and *Smith v. Lloyd*.⁵ In the latter case, which was decided in 1851, Parke, B., giving the judgment of the Court, says: 'We are clearly of opinion that the statute applies, not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C. J., in *McDonnell v. McKinty*,⁴ and the principle on which it is founded.'

"Their Lordships have only to add that, in their opinion, there is no difference in principle as regards the application of the statute between the case of mines and the case of other land where the fact of possession is more open and notorious. . . ."

From the above it is clear that on the abandonment or relinquishment of the property by the adverse possessor, the possession automatically reverts in the owner and that no act is necessary on his part to bring about such reversion. Hence, on such abandonment or relinquishment, limitation ceases to run against the true owner.^{6a}

4. (1847) 10 Ir L R 514.

5. (1851) 23 L J Ex 194 (194) : 9 Ex 562 : 2 C L R 1003 : 22 L T (O S) 239 : 95 R R 837.

6a (1935) A I R 1935 Cal 760 (761) : 159 Ind Cas 752, *Bhabani Prasanna v. Manindra Chandra*.

(1917) A I R 1917 Oudh 330 (336) : 19 Oudh Cas 374 : 37 Ind Cas 715, *Hearsey v. Karam Singh*.

(1922) 63 Ind Cas 749 (752) (Oudh), *Durga v. Ram Padarath*.

(1930) A I R 1930 Lah 303 (303) : 120 Ind Cas 792, *Mangal Singh v. Ali Sher*.

(1905) 32 Cal 247 (291), *Bholanath Singh v. Wood*.

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In *Secretary of State v. Krishna Moni Gupta*,⁶ their Lordships of the Privy Council, relying upon the case of *Agency Co. v. Short*³ above referred to, held that there was no difference in principle between the break in the continuity of possession by the voluntary abandonment by the wrongdoer and a break in the continuity of possession caused by *vis major*, for example, by the submersion of the land under water and they overruled the decision of the Calcutta High Court in *Kally Churn Saho v. Secretary of State*.⁷

In *Basant Kumar Roy v. Secretary of State*,⁸ their Lordships of the Privy Council observed that there can be no continuance of adverse possession when the land is not capable of use and enjoyment, as where the land is submerged under water, inasmuch as adverse possession must rest upon *de facto* use and occupation.

Where, in fact, the trespasser discontinues possession, it is immaterial whether he *intends to return or not*. The discontinuance operates as a break in the continuity without regard to the intention to return or not.⁹

While the defendant is in adverse possession, the plaintiff, the rightful owner, manages to oust him and obtain possession, thus interrupting the defendant's adverse possession. The defendant obtains a decree under Section 9 of the Specific Relief Act and again dispossesses the plaintiff. The period of adverse possession of the defendant again starts only from the date of the dispossession of the plaintiff under the said decree.¹⁰

If, before the expiry of the statutory period, the true owner makes an effective re-entry on the property sufficient to destroy the exclusive character of the trespasser's possession, the latter's adverse possession is thereby interrupted.¹¹ What constitutes such re-entry by the owner depends on the circumstances of each case. As the title rests with the true owner, acts of possession not sufficient to

(1928) A I R 1923 Rang 23 (24) : 77 Ind Cas 905 : 11 Low Bur Rul 361, *Kala Muthu Asari v. Meera Hussein*.

(1907) 2 Ch 539 (538) : 76 L J Ch 602 : 97 L T 294, *Johnson v. Brock*.

(1926) A I R 1926 Pat 130 (136, 137) : 5 Pat 80 : 91 Ind Cas 169, *Midnapore Zamindari Co. Ltd. v. Ram Kanai Singh Deo*.

(1939) A I R 1939 Nag 7 (9, 10). 1938 Nag L Jour 418 (421), *Meherban Lall, Pujara v. Yusuf Khan*.

6. (1902) 29 Ind App 104 (116) : 29 Cal 518 : 4 Bom L R 537 : 6 Cal W N 617 : 8 Sar 269 (P C).

7. (1861) 6 Cal 725 (789) : 8 Cal L R 90 : 4 Shome L R 96.

8. (1917) A I R 1917 P C 18 (21) : 44 Cal 859 : 44 Ind App 104 : 40 Ind Cas 837 (P C).

9. (1935) A I R 1935 Cal 760 (762) : 159 Ind Cas 752, *Dhabani Prosanna v. Manindra Chandra*.

10. (1905) 9 Cal W N 1061 (1064), *Protab Chandra v. Durga Charan*. (Dissenting from 12 Suth W R 9, 12 Suth W R 452, 22 Suth W R 259; and 12 Cal L R 486.)

11. (1928) A I R 1928 Cal 563 (564) : 109 Ind Cas 296, *Bir Bikram Kishore v. Dashrath Rishi*.

(1928) A I R 1928 Cal 582 (585) : 117 Ind Cas 693, *Sourendra Nath v. Nermal Chandra*. (Re-entry by owner against tenant of trespasser operates to destroy the adverse possession of trespasser landlord.)

constitute adverse possession as against another may, when done by the true owner, be sufficient to destroy the legal adequacy and exclusiveness of possession in a trespasser and may amount to interruption of his possession.¹² But the re-entry by the true owner must be more than formal and must be effective to divest the possession of the trespasser and re-vest it in the owner.¹³ Acts such as the following are not of that character :—

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- (a) The mere unyoking of the trespasser's bulls and preventing him from ploughing the land on one occasion or even the cutting away of his crops.¹⁴
- (b) The owner staying as a guest with the possessor.¹⁵
- (c) The owner directing his steward to pull out a stone from the wall of the hut built by the trespasser and to remove a portion of the fencing.¹⁶
- (d) Supplying of materials by the owner for the repair of the house in the trespasser's possession.¹⁷

(1924) A I R 1924 All 844 (845) 79 Ind Cas 1047, *Harpal Kurni v. Mohan Kurni* (The owner is given delivery of possession by the Court under a decree against the trespasser—Adverse possession of the latter is interrupted, though he again re-trespasses subsequently)

12 Ind Cas

.. *Kuara*

[See also (1928) A I R 1928 Cal 563 (564) : 109 Ind Cas 296, *Dir Bikram Kishore v. Dashrath Rishi*

(1901) 26 Bom 410 (417) 4 Bom L R 28, *Vithaldas Kanjishet v. Secretary of State* (Plaintiff occasionally placing his boat on the land and storing material on it once—This will displace defendant's title by adverse possession)]

13 (1850) 9 C B 714 (718) 19 L J C P 306 82 R R 511, *Doe d Baker v. Combes*, (1911) 9 Ind Cas 791 (794) 35 Mad 231, *Parthasarathy Navchen v. Lakshmana Navchen* (A mere transfer of his interests by the true owner will not amount to re entry)

(1911) 10 Ind Cas 363 (365) 38 Cal 622, *Joy Kali Roy v. Hemangini Debi*. (Registration of a name under the Land Registration Act is not necessarily equivalent to actual possession.)

(1920) A I R 1920 Oudh 73 (74) 55 Ind Cas 490, *Chandila v. Sheoraj*. (The title of a person holding land as an under-proprietor cannot be disturbed or destroyed by an adverse entry in the revenue papers or any orders passed by the Revenue Court refusing to enter name in the revenue papers)

(1931) A I R 1931 Cal 25 (26, 27) 57 Cal 796 129 Ind Cas 355, *Jnanendranarayan v. Sarda Sundari Das* (An entry in the Record of Rights that the land was subject to the rights of the plaintiff does not amount to a tacit recognition of the plaintiff's rights on the part of the defendant.)

(1913) 17 Ind Cas 148 (149) 37 Bom 37, *Maganchand v. Vithalrao*. (An application to Assistant Collector for recovery of possession cannot stop limitation)

14. (1921) A I R 1924 Cal 384 (385) 50 Cal 978 79 Ind Cas 491, *Sulur Mohammad v. Asmat Mandal*. (Cutting or taking away growing crop on one occasion)

(1921) 1921 Mad W N 74 (S N).

15. (1923) A I R 1923 Mad 633 (634) 72 Ind Cas 635, *Ammalanann v. Narayanann*

16 (1850) 9 C B 714 (718) 19 L J C P 306 82 R R 511, *Doe d Baker v. Combes* (All this was done in the absence of the trespasser)

17. (1866) 1866 Pun Re No. 52, *Chiragh Shah v. Ghuvetta*.

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(e) Payment of land revenue for the land.^{17a}

It has been seen in Note 16 *ante* that possession to be adverse must be hostile, i. e. in denial of plaintiff's title. If, therefore, before the expiry of the statutory period, the trespasser admits the rightful owner's title, his possession ceases to be adverse,¹⁸ provided that the admission relates to the property in dispute¹⁹ and is unequivocal.²⁰ It has been held that an admission of the plaintiff's title made under a mistake of fact will not interrupt the adverse possession of the person making such admission.²¹

65. Delivery of symbolical possession, if interrupts adverse possession.—The delivery of symbolical possession in execution of a decree to the decree-holder or to the auction-purchaser is, as against the defendant in the suit, equivalent to the delivery of actual possession. It will follow from this that the delivery of such possession to the decree-holder or auction-purchaser will operate as a dispossession of the defendant and will put an end to the adverse possession of the defendant.¹ In *Juggobundhu Mukerjee*

17a (1919) A I R 1919 Oudh 177 (177) : 49 Ind Cas 61 · 21 Oudh Cas 824, *Jalpa Din v. Kalka Baksh Singh*.

18. (1928) A I R 1928 Lah 817 (817) : 106 Ind Cas 814, *Mahomed Baksh v. Nathu*.

[But see (1922) A I R 1922 Oudh 24 (25) : 66 Ind Cas 941, *Abdul Rasheed v. Janakidas* (Submitted not correct.)]

19 (1866) L R 1 Ex 259 (260, 261) 12 Jur (N S) 1024 14 W R (Eng) 836, *Dixon v. Baily*

20. (1925) A I R 1925 Cal 193 (193) 84 Ind Cas 637, *Golam Nazar v. Abbas Molla*.

21. (1937) A I R 1937 Lah 811 (812) · 177 Ind Cas 158, *Amar Nath v. Ram Rakha*.

Note 65

1. (1878) 19 Suth W R 101 (102) : 2 Suther 750 (P C), *Gunga Gobind Mundul v. Bhoopal Chunder Biswas*.

(1897) 19 All 499 (501) : 1897 All W N 127, *Mangli Prasad v. Debi Din*.

(1906) 28 All 722 (723) : 1906 All W N 213 · 3 All L Jour 504, *Jagan Nath v. Milap Chand*.

(1917) A I R 1917 All 812 (812) · 39 All 460 : 39 Ind Cas 745, *Rajendra Kishore v. Bhagwan Singh*.

(1922) A I R 1922 All 55 (55) : 70 Ind Cas 488, *Mt. Purna Kuer v. Mangat Rai*.

(1922) A I R 1922 All 463 (465) : 73 Ind Cas 920, *Ram Lalan Singh v. Harakh Narain Rai*.

(1924) A I R 1924 All 844 (845) : 79 Ind Cas 1047, *Hargal Kurmi v. Mohan Kurmi*.

(1926) A I R 1926 All 691 (692) : 96 Ind Cas 591, *Bairnath v. Sri Bhagwan*.

(1928) A I R 1928 All 412 (418) 50 All 818 : 115 Ind Cas 791, *Sita Ram v. Ram Sunder*

(1931) A I R 1931 All 234 (235) · 124 Ind Cas 767, *Niranjan Lal v. Jhamman Lal*.

(1933) A I R 1933 All 178 (175) 55 All 173 : 149 Ind Cas 819, *Ambika Prasad v. Sada Sheelal*

(1936) A I R 1936 All 85 (85) : 160 Ind Cas 1037, *Mt. Maharaji v. Bhagwati Prasad*.

(1897) 21 Bom 98 (101), *Pandharinath v. Mahabubkhan*.

(1900) Bom 275 (279, 280) : 2 Bom L R 1021, *Gopal v. Krishna Rao*.

(1901) 25 Bom 353 (361) : 2 Bom L R 1097, *Mahadeo v. Parashram*.

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v. *Ramchunder Bysack*,² it was held by a Full Bench of the High Court of Calcutta, that a delivery of symbolical possession under the Code of Civil Procedure against a defendant in the suit is equivalent to the delivery of actual possession. "As against third parties, of course," said their Lordships, "this symbolical possession, (as it is so called) would be of no avail; because they are no parties to the proceeding. But if the defendant should, after this, again dispossess the plaintiff by receiving the rents and profits, we think the plaintiff would have twelve years from such dispossession to bring another suit." The decision in *Juggobundhu's case*² was approved by the Privy Council in *Sri Radha Krishna Chanderji v. Ram Bahadur*³ and it was observed: "This decision is one of long standing and has been followed for many years. Their Lordships see no reason to question or to hold that this rule of procedure should now be altered." A similar view was expressed in *Kesho Pershad v. Mt. Bhagjogna Koer*.⁴ One of the questions in that case was whether the taking of symbolical possession by the holder of a decree against X would have any effect on the adverse possession of Y who was not a party to the suit. Their Lordships observed: "It adds little or nothing that having got a decree he (the decree-holder) took symbolical possession (*dakhal dahani*) or even that he set up boundary pillars well to the north of the land now in suit. The respondents (that is Y) could not prevent his doing these things and their rights are not in any way affected by them." See also the undermentioned cases⁵ in which it was held that symbolical delivery

(1929) A I R 1925 Nag 293 (301) : 116 Ind Cas 70, *Gauri Shankar v. Ibrahim Ali*

(1928) A I R 1928 Oudh 8 (8, 9) : 3 Luck 180 : 105 Ind Cas 781, *Ali Husain v. Mahomed*.

(1910) 8 Ind Cas 236 (238) (Lah), *Amolak Shah v. Maula Baksh v. Muhammad Hafiz v. Saraswati*.

. *Chatterji v. Modhu Sudan*

Mukherji.

(1930) A I R 1930 Lah 914 (915) : 129 Ind Cas 699, *Ram Chand v. Gopal Singh*.

(1930) A I R 1930 Lah 384 (385) : 120 Ind Cas 602, *Sunder Das v. Mahomed Akram Khan*.

[See also (1933) A I R 1933 Rang 407 (409) : 12 Rang 1 : 149 Ind Cas 916, *Swaminathan Padtschi v. Mona China Andi*]

2. (1890) 5 Cal 584 (588) : 5 Cal L R 548 : 3 Shome L R 68 (F B).

3. (1917) A I R 1917 P C 197 (201) : 43 Ind Cas 268 (P O).

4. (1937) A I R 1937 P C 69 (75) : 167 Ind Cas 329 : 16 Pat 258 : 31 Sind L R 242 (P C).

[See also (1928) A I R 1928 Oudh 391 (392) : 111 Ind Cas 862 3 Luck 668, *Ataullah Khan v. Mt. Hans Raj Kunwar*.]

5. (1921) A I R 1921 All 9 (10) : 48 All 520 : 63 Ind Cas 212 (F B), *Jang Bahadur Singh v. Hanumant Singh*

(1899) 21 All 269 (271) : 1899 All W N 56, *Naram Das v. Lalita Prasad*.

(1895) 19 Bom 620 (624, 625), *Haryvan v. Shivram*.

(1922) A I R 1922 Bom 2 (8) : 46 Bom 932 : 68 Ind Cas 91, *Raghunath Vaman v. Kondiba Babaji*

(1880) 5 Cal 584 (586) : 5 Cal L R 548 : 3 Shome L R 68 (F B), *Juggobundhu Mukherjee v. Ramchander Bysack*.

of possession would not affect the rights of a third party or interrupt the running of time in his favour. **Arts. 142 & 144 Note 65**

There is a conflict of decisions as to whether symbolical delivery of a property in execution proceedings will interrupt the adverse possession of the defendant and furnish a fresh starting point of limitation against him in cases where the circumstances are such that actual delivery and not symbolical delivery is the prescribed mode of delivery according to the provisions of the Civil Procedure Code. One view is that symbolical delivery will give a fresh start of limitation for a suit for possession against the defendant, notwithstanding that the circumstances of the case are such that actual delivery and not symbolical delivery is the prescribed mode of delivery under the law.⁶ The other view is that symbolical delivery

(1884) 10 Cal 993 (995), *Runjit Singh v. Bunwari Lall Sahu*.

(1889) 16 Cal 530 (533) (F B), *Jogobundhu Mitter v. Purnanund Gossami*.

(1901) 18 Cal 1000 (1001) (F B), *Puri v. Bepin Behary Mitter*.

Waziruddin v. Lala Deoki Nandan.

Jan Mahomed v. Chunder Mohan

(1881) 11 Cal L R 395 (398), *Dayanidhi Panda v. Kela Panda*.

(1916) A I R 1916 Cal 408 (409) 32 Ind Cas 703, *Sadulla Mridha v. Joyanbunnessa Bibi*

(1918) A I R 1918 Cal 253 (255) : 46 Ind Cas 104, *Salish Chandra v. Brojogopal*.

(1923) A I R 1923 Cal 82 (84) : 77 Ind Cas 564, *Jobeda Khatun v. Tulsi Charan Das*.

(1923) A I R 1923 Lah 534 (535) : 77 Ind Cas 509, *Muhammad Ramzan v. Municipal Committee, Alipur*.

(1925) A I R 1925 Lah 61 (61) : 84 Ind Cas 952, *Muland Lal v. Nam Din*.

(1926) A I R 1926 Mad 42 (44) 90 Ind Cas 1037, *Ranganatha Ayyar v. Srinivasa Iyengar*

(1934) A I R 1934 Nag 36 (39) 30 Nag L R 284 148 Ind Cas 62, *Ganpatrao v. Vithabai*

(1917) A I R 1917 Oudh 135 (135) 42 Ind Cas 192, *Chunni v. Mt. Ashrafan*.

(1923) A I R 1923 Oudh 391 (392) : 111 Ind Cas 362. 3 Luck 669, *Ataulla Khan v. Mt. Hamsraj Kunwar*.

(1917) A I R 1917 Pat 423 (424) 42 Ind Cas 449, *Jhari Singh v. Gopi Pasban*

(1910) 5 Ind Cas 273 (275) (All), *Gajadhar Rai v. Ramlakhan Rai*.

(1910) 6 Ind Cas 467 (471) (Cal), *Khiroda Kanta Roy v. Krishna Das*.

(1911) 9 Ind Cas 271 (272) (Mad), *In re Rama Moothan*.

(1913) 21 Ind Cas 765 (767) (Mad), *Rompicherla v. Shakh Ismael*

[But see (1926) A I R 1926 Cal 1172 (1173) 96 Ind Cas 431, *Jogendra Krishna v. Joy Shih Chaudhury*]

6. (1921) A I R 1921 Cal 985 (387) 70 Ind Cas 420, *Brojendra Kumar Roy v. Ashutosh Roy*

(1922) A I R 1922 Cal 176 (177) 70 Ind Cas 602, *Janakimath v. Baluntha Nath*

(1923) A I R 1923 Cal 371 (372, 373) : 70 Ind Cas 157, *Kuladi Prosad v. Kudiram Misra*

(1926) A I R 1926 Lah 35 (37) : 89 Ind Cas 596, *Harbhajan v. T...*

(1907) 17 Mad L Jour 595 (601), *Gound v. Venkataswami*

(1927) A I R 1927 Mad 849 (850) 103 Ind Cas 243, *Arumma v. Mahalakshmi*

(1923) A I R 1923 Pat 76 (82) 71 Ind Cas 999, 24 Cr L Jour 279, *Madhava Prasad v. Nath Lal, De v. Sar...*

**Arts. 142 & 144
Note 65**

v. Ramchunder Bysack,² it was held by a Full Bench of the High Court of Calcutta, that a delivery of symbolical possession under the Code of Civil Procedure against a defendant in the suit is equivalent to the delivery of actual possession. "As against third parties, of course," said their Lordships, "this symbolical possession, (as it is so called) would be of no avail; because they are no parties to the proceeding. But if the defendant should, after this, again dispossess the plaintiff by receiving the rents and profits, we think the plaintiff would have twelve years from such dispossession to bring another suit." The decision in *Juggobundhu's case*³ was approved by the Privy Council in *Sri Radha Krishna Chanderji v. Ram Bahadur*⁴ and it was observed. "This decision is one of long standing and has been followed for many years. Their Lordships see no reason to question or to hold that this rule of procedure should now be altered." A similar view was expressed in *Kesho Pershad v. Mt. Bhaggogna Koer*.⁴ One of the questions in that case was whether the taking of symbolical possession by the holder of a decree against X would have any effect on the adverse possession of Y who was not a party to the suit. Their Lordships observed: "It adds little or nothing that having got a decree he (the decree-holder) took symbolical possession (*dakhal dahan*) or even that he set up boundary pillars well to the north of the land now in suit. The respondents (that is Y) could not prevent his doing these things and their rights are not in any way affected by them." See also the undermentioned cases⁵ in which it was held that symbolical delivery

(1929) A I R 1925 Nag 293 (301) : 116 Ind Cas 70, *Gauri Shankar v. Ibrahim Ali*.

(1928) A I R 1930 Oudh 8 (8, 9) : 3 Luck 180 : 105 Ind Cas 781, *Ali Husain v. Mahomed*.

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v. *Maula Baksh*.
v. *Muhammad Hafiz*.
v. *Saraswati*.

(1913) 18 Ind Cas 761 (762) (Cal), *Girinarain Chatterji v. Modhu Sudan Mukherji*.

(1930) A I R 1930 Lah 914 (915) : 129 Ind Cas 699, *Ram Chand v. Gopal Singh*.

(1930) A I R 1930 Lah 394 (385) : 120 Ind Cas 602, *Sunder Das v. Mahomed Akram Khan*.

[See also (1933) A I R 1933 Rang 407 (409) : 12 Rang 1 : 149 Ind Cas 916, *Suaminathan Padnack v. Mona China Andi*]

2. (1880) 5 Cal 584 (588) : 5 Cal L R 548 : 8 Shome L R 68 (F B).

3. (1917) A I R 1917 P C 197 (201) : 43 Ind Cas 268 (P C).

4. (1937) A I R 1937 P C 69 (75) : 167 Ind Cas 329 : 16 Pat 258 : 31 Sind L R 242 (P C).

[See also (1928) A I R 1928 Oudh 391 (392) : 111 Ind Cas 362. 3 Luck 668, *Atanullah Khan v. Mt Hans Raj Kunwar*.]

5. (1921) A I R 1921 All 9 (10) : 43 All 520 : 63 Ind Cas 212 (F B), *Jang Bahadur Singh v. Hanumant Singh*

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as v. *Lalla Prasad*.

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nd Cas 91, *Raghunath*

(1880) 5 Cal 584 (586) : 5 Cal L R 548 : 8 Shome L R 68 (F B), *Juggobundhu Mukherjee v. Ramchander Bysack*.

of possession would not affect the rights of a third party or interrupt the running of time in his favour. Arts. 142 & 144
Note 68

There is a conflict of decisions as to whether symbolical delivery of a property in execution proceedings will interrupt the adverse possession of the defendant and furnish a fresh starting point of limitation against him in cases where the circumstances are such that actual delivery and not symbolical delivery is the prescribed mode of delivery according to the provisions of the Civil Procedure Code. One view is that symbolical delivery will give a fresh start of limitation for a suit for possession against the defendant, notwithstanding that the circumstances of the case are such that actual delivery and not symbolical delivery is the prescribed mode of delivery under the law.⁶ The other view is that symbolical delivery

(1884) 10 Cal 993 (995), *Runjit Singh v. Bunwari Lall Sahu*.

(1889) 16 Cal 530 (533) (F B), *Jogobundhu Mitter v. Purnanund Gossami*.

(1891) 18 Cal 520 (525), *Gossain Dalmir Puri v. Bepin Behary Mitter*.

(1907) 6 Cal L Jour 472 (482, 483), *Mir Waziruddin v. Lala Deoki Nandan*.

(1908) 7 Cal L Jour 640 (643), *Ramjan Mahomed v. Chunder Mohan Aditya*.

(1881) 11 Cal L R 395 (395), *Doyanidhi Panda v. Kela Panda*.

(1916) A I R 1916 Cal 408 (409) 32 Ind Cas 703, *Sadulla Mradha v. Joya-bunnessa Bibi*.

(1918) A I R 1918 Cal 253 (255) 46 Ind Cas 104, *Satish Chandra v. Brojo-gopal*.

(1923) A I R 1923 Cal 82 (84) 77 Ind Cas 564, *Jobeda Khatun v. Tulsi Charan Das*.

(1923) A I R 1923 Lah 534 (535) 77 Ind Cas 509, *Muhammad Ramzan v. Municipal Committee, Alipur*.

(1925) A I R 1925 Lah 61 (61) 84 Ind Cas 952, *Mukand Lal v. Ilam Din*.

(1926) A I R 1926 Mad 42 (44) 90 Ind Cas 1037, *Ranganatha Ayyar v. Srinivasa Iyengar*.

(1934) A I R 1934 Nag 36 (39) 30 Nag L R 284 143 Ind Cas 62, *Ganpatrao v. Vithabai*.

(1917) A I R 1917 Oudh 135 (135) 42 Ind Cas 192, *Chunni v. Mt. Ash-rafan*.

(1928) A I R 1928 Oudh 391 (392) 111 Ind Cas 362 3 Luck 668, *Ataulla Khan v. Mt. Hansraj Kunwar*.

(1917) A I R 1917 Pat 423 (424) 43 Ind Cas 449, *Jhari Singh v. Gopi Pasban*.

(1917) A I R 1917 Pat 423 (424) 43 Ind Cas 449, *Jhari Singh v. Gopi Pasban*.

[But see (1926) A I R 1926 Cal 1172 (1173) 96 Ind Cas 481, *Jogendra Krishna v. Joy Shib Chaudhury*]

6. (1921) A I R 1921 Cal 385 (387) 70 Ind Cas 420, *Brojendra Kumar Roy v. Ishutosh Roy*.

(1922) A I R 1922 Cal 176 (178) 70 Ind Cas 602, *Janakmal v. Baikuntha Nath*.

(1923) A I R 1923 Cal 371 (372, 373) 70 Ind Cas 187, *Kulada Prosad v. Kudiram Misra*.

lakshmi

Saha-

(1923) A I R 1923 Pat 76 (82) 71 Ind Cas 999 24 Cri L Jour 279, *Maharaja Partap Uday Nath Saha Deb v. Sunderbans Koer*.

Arts. 142 & 144 is totally ineffective in such cases and will not interrupt the adverse possession of the defendant.⁷

Note 65

Similarly, there is a conflict of decisions as to whether a formal defect in the proceeding constituting the symbolical delivery will make it ineffective to arrest the adverse possession of the defendant, one view being that the adverse possession will not be interrupted in such cases,⁸ the other view being that the adverse possession will be interrupted.⁹

As seen above, symbolical delivery is equivalent to actual delivery in the eye of the law, as against the defendant. Where the land of which symbolical delivery is made is in the occupation of ryots, the plaintiff, suing for possession, will have a period of twelve years from the date when the defendant again dispossesses him by collecting the rents and profits of the land from the ryots.¹⁰ But where the land is in the actual possession of the defendant and he continues in such possession after the symbolical delivery, he should be held to dispossess the plaintiff immediately on the symbolical delivery and the plaintiff must bring his suit for actual possession within twelve years of such delivery.¹¹

7. (1919) A I R 1919 Bom 44 (44) : 43 Bom 559 : 51 Ind Cas 72, *Shridar v. Ganpati*.

(1922) A I R 1922 Bom 2 (3) : 46 Bom 932 : 68 Ind Cas 91, *Raghunath Vaman v. Kondiba Dabaji*.

(1924) A I R 1924 Lah 301 (302) : 71 Ind Cas 885, *Sardar Khan v. Abdulla Khan*.

(1937) A I R 1937 Lah 350 (351) : 174 Ind Cas 821, *Mt. Khairan v. Raghbir Singh*.

(1925) A I R 1925 Mad 1140 (1141) : 86 Ind Cas 439, *Kammayya v. Bhimara Settee Paridesi*.

*v. Bala Khandu-
nu.
af Ali.*

8 (1935) A I R 1935 Lah 612 (613) : 159 Ind Cas 1100, *Mt. Ram Kali v. Gowardhan Lal*.

(1936) A I R 1936 Lah 749 (750) : 166 Ind Cas 377, *Bhagat Ram v. Ali Bahsh*.

9 (1927) A I R 1927 Lah 166 (166) : 101 Ind Cas 254, *Abbas Ali Khan v. Yusuf Ali Khan*.

(1929) A I R 1929 Lah 545 (545) : 118 Ind Cas 391, *Harnam Singh v. Mulhki Ram*.

(1933) A I R 1933 Lah 427 (428) : 145 Ind Cas 345, *Harnam Singh v. Ganda Singh*.

10. (1860) 5 Cal 584 (588) : 5 Cal L R 548 : 8 Shome L R 69 (FB), *Juggobundhu Mukerjee v. Ramchunder Bysack*.

11. (1931) A I R 1931 All 231 (235) : 124 Ind Cas 767, *Niranjan Lal v. Jhamman Lal*.

(1928) A I R 1928 All 412 (413) : 50 All 813 : 115 Ind Cas 791, *Sitaram v. Ram Sunder*.

(1903) 8 Cal W N 40 (51), *Hassan Raja Chaudhry v. Karlas Chandra Singha*.

(1904) 9 Cal W N 292 (299), *Bagdu Mayhi v. Rajah Sri Sri Durga Prosad Singha*.

(1914) A I R 1914 Cal 630 (630) : 23 Ind Cas 298, *Deo Nandan Pershad v. Udit Narayan Singh*.

(1936) A I R 1936 Pesh 7 (8) : 160 Ind Cas 411, *Mt. Jan Sultan v. Abdul Manan*.

Where the transferee under an *invalid* alienation of land which is in the occupation of ryots obtains a decree for possession against the vendor and is given symbolical delivery of possession, the transferee will be deemed to be in adverse possession against the vendor from the date of such delivery, unless the judgment-debtor, in spite of such delivery, continues to collect the rents and profits from the ryots.¹²

Symbolical delivery has the effect only of giving a fresh starting point of limitation for a suit for possession against the defendant who is in adverse possession. Such delivery does not, however, put an end to the title which the defendant acquires by prescription under Section 28 by virtue of his adverse possession for twelve years. In other words, where at the date of the symbolical delivery the defendant has already perfected his title to the property by adverse possession, such title is in no way affected by the symbolical delivery and a suit for possession will be barred although within twelve years of such delivery.¹³

The above principles will apply to sales for arrears of revenue, so that, where, under such sales, the auction-purchaser is given symbolical possession, he can bring his suit for actual possession against the defaulting proprietor at any time within twelve years of such symbolical delivery of possession.¹⁴

66. Decree does not interrupt adverse possession. — *X* obtained a decree for money against *A* who was a trustee in respect of certain properties. *A*'s son subsequently instituted a suit to establish that the property belonged to the trust. While the suit was pending, the property was sold in execution of *X*'s decree in 1898 and was purchased by one *M* who obtained possession thereof. It was subsequently decided in the suit filed by *A*'s son that the property belonged to the trust. *A*'s sons filed a suit against *M* in 1913 for possession of the property on the ground that it was trust property. It was held that the suit was barred. Their Lordships of the Privy Council observed as follows :

"At the moment when it (the decree in *A*'s son's suit) was passed, the possession of the purchaser was adverse, and the

[See (1900) 2 Bom L R 407 (409), *Sitaram v. Naro*]

[But see (1919) 2 Lah L Jour 91 (98), *Ali Baksh v. Mt Ghulam Fatima*]

12 (1915) A I R 1915 Mad 145 (147) 26 Ind Cas 537, *Govinda Doss v. Rajan Venkata Perumal*.

[See (1926) A I R 1926 Oudh 444 (446) 95 Ind Cas 27 2 Luck 233, *Parkasdas v. Janki Ballabha Saran*]

13 (1925) A I R 1925 Oudh 20 (23) 84 Ind Cas 98, *Mt Mahmudunnisa v. Zahid Raza*.

14 (1917) A I R 1917 Cal 193 (201) 37 Ind Cas 239, *Jitendra Kumar v. Mohendra Chandra*

(1917) A I R 1917 Cal 213 (216) 39 Ind Cas 213 44 Cal 412, *Mohim Chandra v. Pyari Lal*.

(1928) A I R 1928 Cal 870 (872) 115 Ind Cas 606, *Jaymukh Nath v. Sheru Azadulla*.

Arts. 142 & 144
Note 66

declaration that the property had been properly made subject to a trust disposition and therefore ought not to have been seized, did not disturb or affect the quality of his possession: it merely emphasised the fact that it was adverse. No further step was taken in consequence of that declaration until the present proceedings were instituted, when it was too late."¹

See also the undermentioned cases² holding the same view, viz. that a mere decree establishing the right of the plaintiff to possession does not interrupt the adverse possession of the plaintiff. In *Singaravelu v. Chokka Mudaliar*,³ Venkatasubba Rao, J., of the Madras High Court observed as follows: "Adverse possession is a question of fact and always implies that the right to immediate possession subsists in the true owner and not in the person having adverse possession. An adjudication that the true owner had a good title to possession is entirely consistent with the fact that the actual possession is with another party who ousted the true owner and has been holding possession as against the true owner on his own behalf. I therefore fail to see how a decree which negatived the first defendant's right could possibly be regarded in the nature of an interruption of the continuity of possession."

Note 66

1. (1923) A I R 1923 P C 175 (176, 177) : 50 Ind App 295 : 46 Mad 751 : 74 Ind Cas 492 (P C), *Subbaya Pandaram v. Md. Mustafa Marakayar*.
2. (1937) I L R (1937) 2 Cal 234 (240), *Bijay Gopal v. Gopee Das* (Declaratory decree does not interrupt adverse possession.)
 - (1876) 25 Suth W R 249 (250), *Mulbool Ali v. Wajed Hossein*. (Do.)
 - (1923) A I R 1923 Mad 88 (91) : 46 Mad 525 : 70 Ind Cas 994, *Singaravelu Mudaliar v. Chokka Mudaliar*. (Do.)
 - (1911) 9 Ind Cas 795 (795, 796) (Mad), *Puthia Valapil Ayissa v. Lakshmana Prabhu*. (Do.)
 - (1910) 8 Ind Cas 883 (884) (Mad), *Raghunathachariar v. Tiruvengada Ramanujacharya*. (Do.)
 - (1936) A I R 1936 All 466 (467) : 163 Ind Cas 545, *Mahomed Tahsr v. Bechey Lal*. (Do.)
 - (1930) A I R 1930 Lah 472 (474) : 129 Ind Cas 703, *Jaimini Das v. Phulla Khan*. (Do.)
 - (1930) A I R 1930 Lah 297 (299) : 120 Ind Cas 486, *Mahomed Ibrahim v. Shaida Muhammad*. (Do.)
 - (1937) A I R 1937 Lah 602 (606, 607) : I L R (1937) Lah 255 : 172 Ind Cas 259, *Har Indar Singh v. Shiv Ram*. (Do.)
 - (1926) 99 Ind Cas 956 (957) : 8 Lah L Jour 572 (575), *Alla Bakhsh v. Shadi*. (Do.)
 - (1872) 17 Suth W R 119 (120) : 8 Beng L R 540, *Amiroonissa Begum v. Umar Khan*. (Decree for possession.)
 - (1926) 98 Ind Cas 827 (828) (All), *Dalle v. Amira*. (Do.)
 - (1872) 17 Suth W R 450 (451), *Kalee Kishore Sen v. Nilamber Sen*. (Do.)
 - (1922) A I R 1922 Lah 70 (71) : 64 Ind Cas 352, *Fazal v. Mihan Khan*. (Do.)
 - (1930) A I R 1930 Bom 400 (400) : 129 Ind Cas 338, *Mulchand v. Hirabai*. (Do.)
 - (1939) A I R 1939 Bom 1 (18) : 179 Ind Cas 178, *Narayan Jivaji v. Gurunathgouda*. (Do.)
3. (1923) A I R 1923 Mad 88 (91) : 46 Mad 525 : 70 Ind Cas 994. (Dissenting from A I R 1920 Bom 61.)

In some decisions⁴ it has been held that a decree in favour of the plaintiff will interrupt the adverse possession of the defendant. It is submitted that this view is not correct. But, where the plaintiff obtains possession under a decree, the defendant's adverse possession will be interrupted although the decree is reversed on appeal and possession is restored to the defendant on such reversal.⁵

**Arts. 142 & 144
Notes 66-67**

In the undermentioned case,⁶ a third party obtained a decree for possession against the defendant and obtained possession in execution of such decree. The decree was reversed on appeal and possession was restored to the defendant. It was held that the defendant's adverse possession against the plaintiff was not interrupted by the third party's possession. It is submitted that the decision is not correct, inasmuch as the Statute requires actual possession on the part of the defendant for the statutory period in order to create a title by prescription in his favour and mere absence of possession on the part of the plaintiff is not enough.

In a suit for possession of land which was in the actual occupation of third parties, viz rayats, it was held that a former decree obtained by the plaintiff against the rayats for rent showed that at the date of the decree the plaintiff was in possession as landlord and that therefore the decree saved the suit from limitation.⁷

67. Effect of attachment on adverse possession. — An attachment of immovable property under the Civil Procedure Code does not affect the possession of the property. Hence, such attachment does not interrupt the adverse possession of the property.¹ But, where on an attachment a claim petition is filed by the adverse possessor and rejected and he does not institute a suit within one

4 (1888) 5 All 345 (354) 1883 All W N 81 (F B), *Sarsuti v Kunj Behari Lal* (1932) A I R 1932 Sind 35 (38) 26 Sind L R 127 140 Ind Cas 228, *Gagumal Metharam v Allahbux* (Decree for possession and ownership breaks continuity of possession of defendant)

(1920) A I R 1920 Bom 61 (61) 44 Bom 934 58 Ind Cas 96, *Abba Ali Meer Inayatalli v. Abdul Aziz Mir Saheb Jahagirdar*. (Decree for possession)

(1921) A I R 1921 Bom 470 (470) 45 Bom 913 61 Ind Cas 414, *Rukhmanbai v. Ramchandra Vasudev* (Do)

(1934) A I R 1934 Bom 273 (276) 58 Bom 410 154 Ind Cas 824, *Janak Ganpati v. Vishnu Rambhau* (Do)

(1892) 2 Mad L Jour 210 (212) *Bapayya v. Dasanah* (When the tenant under X is in possession and the plaintiff's title to the land is declared in a suit against X, a suit by the plaintiff brought within 12 years of such declaration held not barred, as the tenant's possession is the possession of X)

5. (1917) A I R 1917 Mad 609 (691) 35 Ind Cas 421, *Laxmipathaya v. Ramachandra*

6. (1898) 22 Bom 733 (736), *Daidu v. Kalu*.

7 (1914) A I R 1914 Cal 630 (631) 23 Ind Cas 292, *Dev Narayan Prasad v. Udit Narayan Singh*.

Note 67

1. (1901) 11 Mad L Jour 344 (345), *Setharam Reddy v. Venkatesh* (When a trespasser is holding the property adversely to the owner the attachment of the property by a person who has got a decree against the owner, does not prevent the running of time in favour of the trespasser)

**Arts. 142 & 144
Note 67**

year (under Article 11 *ante*) to establish his right (see Civil Procedure Code, Order 21 Rule 63), it has been held that he will be precluded from pleading that he was in adverse possession on the date of the order dismissing his claim petition.² But he will not be precluded from pleading that his possession has been adverse *from* the date of the order rejecting his claim.³ Further, where the attachment is *raised* subsequently, the adverse order on the claim petition ceases to be effective and the adverse possessor is not precluded from contending that he was in possession on the date of the order, although he has not questioned the order by means of a suit within one year under Article 11.^{3a}

An attachment of property under Sections 145 and 146, Criminal Procedure Code, is effected by the Magistrate actually taking possession of the property.^{3b} Hence, it cannot be said that such attachment does not affect the possession of the property. Such possession, however, enures to the benefit of the party in *actual* possession at the date of the proceedings if the attachment is under Section 145, and to the benefit of the party *lawfully entitled* to the property if the attachment is made under S. 146. Hence, where the property is in the possession of a trespasser and is attached under Section 145, Criminal Procedure Code, the attachment does not interrupt the possession of the trespasser.⁴ But, where the attachment is under Section 146, the possession of the trespasser will be interrupted, inasmuch as the possession of the Court during the attachment will be one on behalf of the true owner.⁵

On the same reasoning, where the possession is with the true owner at the date of the attachment under Section 146, the attachment does not amount to a *dispossession* of the true owner.^{5a}

(1926) A I R 1926 Mad 42 (48) : 90 Ind Cas 1087, *Ranganath Iyer v. Srinivasa Iyengar*.

(1869) 4 Mad H C R 281 (285), *Krishnama Rajah v. Narayanasamy Rajah*.

(1937) A I R 1937 Mad 44 (46) : 166 Ind Cas 308, *Dharapuram Janopakhara Nidhi, Ltd v. Lakshminarayana Chettiar*.

(1926) A I R 1926 Oudh 43 (43) : 89 Ind Cas 424, *Harkishan Das v. Mt. Sundro Bibi*.

2. (1885) 8 Mad 506 (510), *Velayuthan v. Lalshmana*.

8. (1937) A I R 1937 Mad 44 (46) : 166 Ind Cas 308, *Dharapuram Janopakhara Nidhi Ltd. v. Lakshminarayana Chettiar*.

3a. (1937) A I R 1937 Mad 44 (46) : 166 Ind Cas 308, *Dharapuram Janopakhara Nidhi Ltd. v. Lakshminarayana Chettiar*.

3b. See Notes under Sections 145 and 146 of the Authors' Code of Criminal Procedure

4. See (1926) A I R 1926 Cal 782 (786) : 95 Ind Cas 117, *Abinash Chandra v. Tarini Charan*.

5. (1921) A I R 1921 Cal 594 (586) : 66 Ind Cas 433, *Sarat Chandra v. Bibhabati Debi*.

(1922) A I R 1922 Cal 419 (421) : 49 Cal 544 : 65 Ind Cas 200, *Panna Lal v. Panchu Ruidas*

5a. (1916) A I R 1916 Cal 751 (752, 753) : 31 Ind Cas 242, *Drojendra Kishore Roy v. Bharat Chandra Roy*.

(1902) 26 Mad 410 (413, 414, 415), *Rajah of Venkatagiri v. Isakapalli Subbiah*.

Where property is under attachment under Section 146, Criminal Procedure Code, the remedy of the true owner is by a suit for declaration of title and not for possession, as the property must be deemed to be only in the possession of the true owner during such attachment. Hence, although the true owner may frame his suit as one for possession, it must be treated as one for declaration of title and will not be governed by Article 142 or Article 144 as the case may be.⁶

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Notes 67-68

See also the undermentioned cases ⁷

68. Decision of Revenue Officer or Court regarding boundary, if interrupts adverse possession.—A decision of the Revenue authorities as to the boundaries of lands cannot have the effect of dispossessing as a fact any party who is in possession, and cannot constitute an interruption of possession. In *Kuppusami v Venkatasami*,¹ a case under the Madras Surveys and Boundaries Act, 1897, Mr. Justice Ramesam negatived the contention based on a decision of the Full Bench in *Muthirulandi Poosari v. Sethurama Iyer*,² that the decision of a Survey Officer as regards boundaries interrupted the adverse possession of the party in possession at the date of the decision. He held that the Full Bench did not decide the question. In *Azhaga Perumal Pillai v Rasa Pillai*,³ a Bench of the High Court of Madras observed as follows:

“Neither the decision of the Survey Officer nor the planting of stones in accordance with it in proceedings under the Act *ipso facto* dispossesses any party, nor could it make a legal break in existing possession so as to render ineffective, for purposes of limitation, any adverse possession running at its date. We do not agree with Mr. Ramachandra Iyer that that is the effect of the opinion of the Full Bench in *Muthirulandi Poosari v Sethurama Iyer*.⁴ Our view on this point is supported by the opinion of Ramesam, J., in *Kuppusami Iyer v Venkatasami*,⁵ and that of Benson and Krishnaswami Iyer, JJ., in S A No. 1102 of 1909. It would be very extraordinary if the Survey

6. (1922) A I R 1922 Cal 419 (421) 65 Ind Cas 200 49 Cal 544, *Panna Lal v Panchu Rindas*

(1916) A I R 1916 Cal 751 (753) 31 Ind Cas 242, *Brojendra Kishore Roy v Bharat Chandra Roy*

7. (1869) 6 Bom H C R App Cas 41 (44), *Lado Lakshuman v. Krishnaji Sadashiv*. (Property in possession of defendant attached by Government—Property then restored to defendant—Held that there was no interruption of the possession of defendant during the attachment.)

(1888) 1888 Bom P J 341, *Vishnu v. Dhikaji* (Period during which a village was under attachment by Government could not be taken into consideration in determining the duration of defendant's adverse possession.)

Note 68

1. (1923) A I R 1923 Mad 29 (29) 70 Ind Cas 672

2. (1919) A I R 1919 Mad 779 (781) 42 Mad 425 50 Ind Cas 43 (F B)

3. (1932) A I R 1932 Mad 310 (311) 138 Ind Cas 362.

4. (1919) A I R 1919 Mad 779 (781) 42 Mad 425 50 Ind Cas 43 (F B)

5. (1923) A I R 1923 Mad 29 (29) 70 Ind Cas 672

Arts. 142 & 144
Note 68

Officer's decision could have such a result—a result which would follow no decision of a Civil Court that a party had or had not title."

A similar view has been taken by the High Court of Bombay in a case arising under the Bombay Land Revenue Code, 1879.⁶

A contrary view has, however, been held by a single Judge of the Madras High Court in the undermentioned case,⁷ relying upon the view expressed to the same effect in *Ramamurthi v. Narayan Gajapathi*,⁸ in which Waller, J., observed that the Full Bench case referred to above did actually decide that such decision operated as an interruption of adverse possession. It is submitted that the contrary view stated above cannot be accepted as correct. The question referred to the Full Bench was as to the conclusiveness of the decision of the Revenue Officer on the rights of the parties as on the date of the order. It does not seem to be possible to regard the Full Bench as having impliedly decided what is really against sound principles of law. In *Achutaramayya v. Soorapayya*,⁹ Mr. Justice Wadsworth reviewed the previous authorities and held that a decision of the Revenue Officer as to the title of the parties would not interrupt adverse possession, but that if the Revenue Officer gave a finding that the defendant was not in *actual physical possession* on the date of the order, the finding cannot be challenged by the defendant in a suit by the plaintiff for possession.

Where A in possession made a declaration that he held the property as trustee for B and the Revenue Court on the application of B subsequently ordered mutation in his name, it was held that this constituted clear dispossession of A.¹⁰

See also the undermentioned cases.¹¹

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6. (1920) A I R 1920 Bom 215 (216) : 59 Ind Cas 437, *Manal v. Narayan*. (Fixing boundaries under S. 121 of Bombay Land Revenue Code)
 7. (1934) A I R 1934 Mad 685 (686) : 152 Ind Cas 462, *Seetharamaraju v. Narayanaraju*.
 8. (1933) A I R 1933 Mad 279 (281, 289) : 56 Mad 366 . 141 Ind Cas 307.
 9. (1939) A I R 1939 Mad 61 (62, 63).
 10. (1923) A I R 1923 All 59 (63) : 69 Ind Cas 971 : 45 All 169, *Udit Narayan Singh v. Randhir Singh*.
 11. (1921) A I R 1921 Pat 31 (32) . 61 Ind Cas 46 : 6 Pat L Jour 51, *Mahant Parbhucharan Bharti v. Secretary of State*. (The order of the Collector under S. 41 of the Bengal Survey Act in the case of a boundary dispute operates as the order of a Civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector and hence operates as a dispossession of the party adversely affected by the order)
 - (1921) A I R 1921 Pat 277 (278, 279) : 61 Ind Cas 78, *Bahadur Ali Khan v. Secretary of State*. (An adverse decision under S. 41 of the Bengal Survey Act amounts to dispossession within the meaning of Article 142.)
 - (1911) 10 Ind Cas 363 (365) (Cal), *Joy Kali Roy Choudhury v. Hemangini Debi*. (Mere registration of owner's name in Collectorate does not interrupt adverse possession.)
 - (1926) A I R 1926 Oudh 263 (264) . 91 Ind Cas 19, *Mt. Saira Bibi v. Kasim Husain*. (Revenue Court's order refusing mutation of names in favour of a person in respect of an immovable property amounts to dispossession.)

69. Subsequent assertion of a different title by defendant, if affects his adverse possession.—The Government sold a certain taluk for arrears of Government revenue and it was purchased by X who was put in possession thereof in 1855. A filed a suit in 1868 against X for possession on the ground that the sale by the Government was void. He alleged that subsequent to 1855 the Government had made a new grant to X of the said land at an increased revenue, and this gave a fresh cause of action to the plaintiff. It was held that it did not give the plaintiff any fresh cause of action and that the suit beyond twelve years of the first dispossession in 1855 was barred.¹

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Notes 69–70

70. Submerged land.—A person who has a title to land does not lose it by reason of the fact that it becomes submerged under water and thus becomes incapable of use and enjoyment. It follows that where land which became submerged under water re-forms and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it.¹ The leading case on the point is *Felix Lopez v. Muddun Mohun Thakoor*.² In that case their Lordships of the Privy Council referred to the following passage in Hale's '*De Jure Maris*' (page 15)

"If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity and bounding up on the firm land, the same can be known, or it be by art or industry regained, the subject doth not lose his property . . . But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make out where and what it was, for he cannot lose his propriety of the soil, although it for a time becomes part of the sea, and within the Admiral's jurisdiction while it so continues"

Their Lordships then observed as follows :

"This principle is one not merely of English law, nor a principle peculiar to any system of municipal law, but it is a principle founded in universal law and justice, that is to say,

Note 69

1. (1874) 22 Suth W R 187 (187) 1 Ind App 335 3 Sar 39 3 Suther 30 (P C), *Raja Sri Chaitanya Chundra v. Collector of Ganjam*.

Note 70

- 1 (1875) 23 Suth W R 1 (9) 14 Beng L R 268 2 Ind App 28 3 Suther 56 : 3 Sar 411 (P C) *Hursahat Singh v. Syud Loof Ali Khan*
(1906) 3 Cal L Jour 560 (568) 1 Vid L Tim 175 (P C), *Rani Hemanta Kumari Deby v. Secretary of State*
(1935) A I R 1935 P C 125 (126, 127) 156 Ind Cas 548 (P C), *Tara'das v. Secretary of State*.
(1867) 2 Agr 64 (67), *Hur Sahai v. Mahomed Dinn Khan*
(1905) 3 Cal L Jour 316 (333), *Ananda Hari Das v. Secretary of State*. (2 Ind App 28, Followed)
2 (1870) 18 Moo Ind App 467 (472) 14 Suth W R P C 11 5 Beng L R 521 . 2 Suther 336 2 Sar 594 (P C) (3 Suth W R 51, Overruled)

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Note 70

that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner."

But, in order to apply the doctrine in *Lopez's case*² it is necessary that the person claiming the re-formed land should have been, before submersion, *entitled* to it. The onus will be on him to show that he had a subsisting title to the property on the date of the submersion.³ Where a person acquires a title by adverse possession to land re-formed after submersion, and thereafter the land is again submerged and again re-formed, the title to it will be that of the person who had acquired title by adverse possession and not of the original owner.⁴

Not only will the *title* continue in the owner during the period of submersion, but *possession in law* would be considered to be in the *true owner* during such period.⁵ This would be so whether the true

3. (1935) A I R 1935 P C 125 (126) : 156 Ind Cas 548 (P C), *Tarakdas v. Secretary of State*.

(1925) A I R 1925 Cal 1230 (1231) : 88 Ind Cas 567, *Panchanon Sarkar v. Basanta Kumari*.

4. (1877) 8 Cal 796 (800) : 1 Cal L R 259 : 3 Suther 486 : 3 Sat 776 : 2 Ind Jur 147 (P C), *Radha Prosad Singh v. Ram Koomar Singh*.

(1927) A I R 1927 Oudh 519 (520) : 106 Ind Cas 86, *Bhagwan Bahsh Singh Dejaypal Singh*.

5. (1917) A I R 1917 P C 18 (21) : 44 Cal 858 : 44 Ind App 104 : 40 Ind Cas 327 (P C), *Basant K. v. Secretary of State*.

W N 617 :

(1881) 7 Cal L R 864 (868) : 3 Suther 600 (P C), *Amenda Second Ray v. Inglis*. (The burden of proving that the plaintiff has lost that title by reason of the adverse possession of the defendant would then be upon the defendant.)

(1921) A I R 1921 Cal 687 (695) : 65 Ind Cas 866, *Secretary of State v. Wayed Ali*.

(1925) A I R 1925 Cal 1230 (1231) : 88 Ind Cas 567, *Panchanon Sarkar v. Basanta Kumari Dasi*.

(1906) 28 All 760 (762) : 3 All L Jour 567 : 1906 All W N 234, *Munshi Mashar Hasan v. Behari Singh*.

(1935) 163 Ind Cas 897 (902) : 62 Cal L Jour 177 (188) : 63 Cal 300, *Surendra Kumar Roy v. Ahmed Nawab Chowdhury*.

(1922) 65 Ind Cas 769 (770) (Oudh), *Bachcha Singh v. Sri Kamlapat Prosad*.

(1930) A I R 1930 Lah 417 (417) : 122 Ind Cas 486, *Khan Beg v. Khuda Dalsh*.

(1925) A I R 1925 All 187 (195) : 153 Ind Cas 708 : 57 All 588, *Sri Krishna Dutt v. Mt. Ahmad Bibi*.

(1933) A I R 1933 Pat 468 (470) : 148 Ind Cas 444, *Rasdhari Lal v. Nandlal Mahton*.

(1930) 123 Ind Cas 817 (819) (All), *Ram Krishan Das v. Mul Chand*.

(1915) A I R 1915 All 286 (289) : 29 Ind Cas 278, *Baldeo Thakurani v. Ugrnath Misra*.

(1925) A I R 1925 Cal 1230 (1231) : 88 Ind Cas 567, *Panchanon Sarkar v. Basanta Kumari*.

(1925) A I R 1925 Cal 1230 (1231) : 88 Ind Cas 567, *Panchanon Sarkar v. Basanta Kumari*.

(1925) A I R 1925 Cal 1230 (1231) : 88 Ind Cas 567, *Panchanon Sarkar v. Basanta Kumari*.

(1925) A I R 1925 Cal 1230 (1231) : 88 Ind Cas 567, *Panchanon Sarkar v. Basanta Kumari*.

owner was or was not in possession before the date of the submergence, provided he had a subsisting title to the land on that date. If he was in possession on that date, his possession would not terminate by reason of the submergence, but will be deemed to continue during the period of submersion.⁶ If he was not in possession on that date but had a subsisting title, the possession of any person who was occupying the land at that time wrongfully would terminate⁷ and the true owner would be deemed to be constructively in possession. The reason is that constructive possession cannot be implied in favour of a wrongdoer.⁸ Nor will such possession enable

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- (1925) A I R 1925 Lah 627 (627) : 92 Ind Cas 178, *Barlat v. Relu Mal*.
 (1913) 18 Ind Cas 613 (615) (All), *Loknath v. Manorath Ram*
 (1924) A I R 1924 Cal 855 (863) : 51 Cal 669 : 78 Ind Cas 679, *Suresh Chandra v. Shuti Kanta*.
 (1927) A I R 1927 Cal 97 (98) : 91 Ind Cas 5, *Mohendra Nath v. Nabadwip Chandra Nandy*.
 (1876) 1876 Pun Re No. 19, *Sahib Rai v. Khair Shah*.
 (1929) 117 Ind Cas 318 (319) (Pat), *Ali Muddin v. Salim*.
 (1921) A I R 1921 Cal 277 (281) : 66 Ind Cas 923, *Maharaja of Cooh Behar v. Mahendra Ranjan Rai*.
 (1923) A I R 1923 All 75 (76, 77) : 69 Ind Cas 912, *Ram Narain Misir v. Deoki Misir*.
 (1915) A I R 1915 Cal 451 (452) : 28 Ind Cas 426, *Mahadeo Prasad v. Mt Sheonandan Koor*.
 (1938) A I R 1938 Mad 470 (473), *Secretary of State v. Surya Rao Bahadur Garu*.
 (1933) A I R 1933 Pat 468 (470) : 148 Ind Cas 444, *Rasdhansil v. Nandlal Mahlon*.
 (1923) 74 Ind Cas 881 (891) (Pat), *Keshav Prasad Singh v. Secretary of State*.
 (1915) A I R 1915 Cal 464 (473) : 29 Ind Cas 156, *Amrita Sundari v. Shera-juddin Ahamed*
[See also (1929) 117 Ind Cas 202 (203) (Pat), Parbu Pandey v. Rameshwar
 (1904) 9 Cal W N 111 (115), *Madhabi Sundari Dassya v. Gaganendra Nath Tagore*.

- G. (1930) A I R 1930 P C 198 (200) : 126 Ind Cas 81 (P C), *Rampati Chatterjee v. Ramani Mohan Sen*
 (1905) 3 Cal L Jour 316 (336), *Ananda Hari Basal v. Secretary of State* (The principle applies even where Government is the owner)
 (1906) 1906 Pun L R No 158, *Amir Muhammad Shah v. Sultan Khan*.
 7. (1921) A I R 1921 Cal 687 (695) : 65 Ind Cas 866, *Secretary of State v. Wazed Ali Khan*.
 8. (1902) 29 Ind App 104 (105) : 29 Cal 518 : 4 Bom L R 537 : 6 Cal W N 617 : 8 Sir 200 (P C), *Secretary of State v. Krishnamoni Gupta*
 (1930) A I R 1930 Lah 417 (417) : 122 Ind Cas 486, *Khan Ekj v. Khuda Balhsh*
 (1922) A I R 1922 Cal 557 (564, 565) : 67 Ind Cas 673, *Rakhai Chandra Ghose v. Durgadas Samantia*
 (1912) 16 Ind Cas 17 (17) (Cal), *Golap Moni Das v. Kali Charan Kundu*.
 (1910) 6 Ind Cas 359 (360) (Cal), *Baroda Prasad v. Annoda Mohan*

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a wrongdoer to acquire a title by adverse possession, inasmuch as in order to acquire a title by adverse possession, *actual* possession on the part of the wrongdoer is necessary during the whole period of twelve years.^{6a} (See Note 53 *ante*.)

The result is that if the true owner is shown to have been in possession at the date of submergence and the submergence continued till within twelve years of the suit, the true owner is entitled to recover possession of the land from any wrongdoer in possession. Even if at the time of the submergence the wrongdoer is in possession, the submergence would operate as an *interruption* of the adverse possession, and if the re-formation of the land has taken place within twelve years of the suit, the true owner is entitled to recover the same from the wrongdoer.⁹

In *The Secretary of State for India v. Krishnamoni Gupta*,¹⁰ the Government had dispossessed the true owner of certain lands and were in adverse possession thereof at the time of its submergence under water. The submergence continued till within twelve years of the suit for possession by the true owner. It was held by their Lordships of the Privy Council that the plaintiff was entitled to succeed. Their Lordships observed as follows :

"It is urged on behalf of the Government that, having been in possession through their tenants when the lands became submerged, their possession must be deemed to have continued in law while the lands were under water, and to have revived on their being re-formed, and reliance is placed on a case of *Kally Churn Sahoo v. Secretary of State*,¹¹ decided by the High Court in 1881. For the purpose of trying the question whether limitation applies, the Government must be regarded as a trespasser and dispossessor of the rightful owners, and in the opinion of their Lordships *it would be contrary both to principle and authority to imply such constructive possession in favour of a wrongdoer so as to enable him to obtain thereby a title by limitation*. In order to sustain a claim to land by limitation under the Indian Act, there must, in their opinion,

(1936) 163 Ind Cas 897 (902) : 63 Cal 300 (312), *Surendra Kumar Roy v. Ahmed Nawab Choudhry*.

(1936) A I R 1936 Oudh 887 (898) : 164 Ind Cas 118, *Partab Bahadur Singh v. Jagatjit Singh*.

(1905) 3 Cal L Jour 316 (336), *Ananda Hari Basak v. Secretary of State*.

8a. (1921) 1 I R 1001 Cal 1000 (1001), 67 Cal 200 (201), 10 Cal 200 (201).

cannot take the place of actual adverse possession)

(1915) A I R 1915 Cal 451 (452) : 28 Ind Cas 426, *Mahadco Prasad v. Mt. Sheonandan Kuer*. (Trespasser's leasing out the fishery rights during the period of submergence is not actual possession of the land by him)

9. (1912) 17 Ind Cas 91 (95) : 34 All 612, *Habibullah Khan v. Lalla Prasad*.

10. (1902) 29 Ind App 104 (115) : 29 Cal 518 : 4 Bom L R 537 : 6 Cal W N 617 : 8 Ear 260 (P C).

11. (1881) 6 Cal 725 (740) : 8 Cal L R 90 : 4 Shome L R 96.

be actual possession of a person claiming as of right by himself or by persons deriving title from him. *The possession of the Government was in fact determined by the submergence of the land which then became derelict*, and so long as it remained in that state no title could be acquired against the true owner. Sir R. Garth, however, seems to have thought that in such a case the possession of a trespasser would continue until the true owner resumed possession.

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"Their Lordships cannot agree in this view. On the contrary, they think that on the dispossession of the Government by the *vis major* of the floods, the constructive possession of the land was (if anywhere) in the true owners. In the case of *Trustees, Executors and Agency Co. v. Short*,¹² it was laid down by this Board that 'if a person enters upon the land of another and holds possession for a time, and then without having acquired title under the statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place.' And the opinion of Parke, B., is there quoted that there must be both absence of possession by the person who has the right and *actual possession* by another to bring the case within the statute.

"*Their Lordships think that for this purpose dispossession by vis major* has the same effect as voluntary abandonment, and they are of opinion that the case of *Kally Churn Sahoo v. Secretary of State*,¹³ was wrongly decided, and ought to be overruled."

*Krishnamoni Gupta's case*¹⁰ was followed by their Lordships of the Privy Council in the case of *Basant Kumar v. Secretary of State*,¹⁴ where their Lordships held that no rational distinction could be drawn between a case where the re-flooding was seasonal and occurred for several months in each year and a case where the submergence continued for several years at a time. Their Lordships further observed "A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession, constructively it continues until he is dispossessed, and upon the cessation of the dispossession before the lapse of the statutory period, constructively it *revives* . . . it seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation"

In *Bhupendra v. Rageswar*,¹⁵ their Lordships of the Privy Council again reiterated the same view and observed. "While lands are submerged, constructive possession is with the true owner, and

12. (1888) 37 W R (Eng) 433 (434)

13. (1881) 6 Cal 725 (740) 8 Cal L R 90 4 Shome L R 96

14. (1917) A I R 1917 P C 18 (21) 44 Cal 553 44 Ind App 104 40 Ind Cas 337 (P C)

15. (1931) A I R 1931 P C 162 (164) 132 Ind Cas 610 55 Ind App 225 53 Cal 80 (P C)

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that, though immediately prior to the diluviation physical possession had been with the adverse claimant."

It has been held in some cases¹⁶ that in order that constructive possession may be deemed to be in the true owner, it is necessary that such owner *must have been in possession* at the date of the submergence. It is submitted that this view is not correct.

The principle that constructive possession is in the true owner during the period of submergence of the land under water is based really on the fact that the land is *incapable* of actual enjoyment during the period of submergence and that the adverse possession of the wrongdoer (which must be actual) is thereby terminated. The principle would not, consequently, apply where the lands go under water for a few days every year but without interfering with the usual agricultural operation on the land.¹⁷

Where a person claims to have been in adverse possession for the required period of the land *after* its re-formation, no question arises as to the applicability of the doctrine in *Lopez's case*.¹⁸

71. Receiver and adverse possession. — Where the owner of certain property died and the property was kept *derelict* (the heirs being absent from the place) and possession was taken by the officials of the Court, it was held by the Privy Council that it must be presumed that such possession was taken for the benefit of the persons rightfully entitled.¹

The same principle holds good even in cases where rival claimants to the possession of the property are present and a Receiver is appointed by the Court to take charge of the properties *pendente lite*. The possession of the Receiver in such cases would really be on behalf of the person who is ultimately found entitled to it,² and is

10. (1906) 1906 All W N 281 (235) : 28 All 760 : 3 All L Jour 567, *Munshi Mazhar Hasan v. Bihari Singh*.

Ghose v.

Vand Lal.

v. Nand

Lal.

(1917) A I R 1917 Oudh 830 (337, 338) : 19 Oudh Cas 374 : 37 Ind Cas 715, *Hearsey v. Sardar Karam Singh*.

1917 All 1000 (1000) : 2 Ind Jur

anta Kumar

Roy.

(1921) A I R 1921 Cal 277 (282) : 66 Ind Cas 923, *Maharaja of Cooch Behar v. Mahendra Ranjan Rai Chaudhri*.

Note 71

1. (1914) A I R 1914 P C 243 (246) : (1912) A C 230 : 81 L J P C 151 (P.C.), *Corea v. Appuhamy*.

2. (1920) A I R 1926 Cal 395 (392) : 52 Cal 914 : 90 Ind Cas 851, *Eastern Mortgage and Agency Co. Ltd v. Mohammad Farul Karim*.

(1924) A I R 1924 Cal 600 (610) : 79 Ind Cas 520, *Dwijendra Narain v. Joges Chandra*.

(1901) 27 Mad 591 (593) : 14 Mad L Jour 297, *Vedanyaga Mudaliar v. Vedammal*.

not adverse to him.³ But the possession of the Receiver would operate as a dispossession of the wrongdoer who was in possession at the date of the appointment, and would thus operate as an *interruption of the adverse possession*, so that the wrongdoer cannot, for the purpose of computing the period of limitation, count the period of his possession before the Receiver took possession.⁴

The mere appointment of a Receiver however, without his taking actual possession of the property, will not interrupt adverse possession of the wrongdoer.⁵

72. Abandonment of possession.—Where a *trespasser* abandons his possession before the expiry of the statutory period, the rightful owner, on such abandonment, is in the same position in all respects as he was before the intrusion takes place.¹ The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose.²

The question of abandonment by the owner must be considered with reference to local circumstances and conditions. Where a person fails for a long time to take up or keep up a property of *value* and has no explanation for his neglect, it may be fair to suppose that

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Notes 71-72

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- (1905) 2 Cal L Jour 602 (611), *Sarala Sundari Das v. Saroda Prosad Sur*.
 (1918) A I R 1918 Mad 974 (978) . 40 Ind Cas 50, *Subbiya Pandaram v. Mahamad Mustapha Maracayar*.
 (1927) A I R 1927 Mad 61 (62) 97 Ind Cas 783, *Hari Sahib v. Shriaji Raja Sahib*.
 (1936) A I R 1936 Oudh 387 (395) 12 Luck 371 . 164 Ind Cas 118, *Partab Bahadur Singh v. Jagatjit Singh*.
 (1928) A I R 1928 Pat 260 (264) 7 Pat 319 103 Ind Cas 89, *Bisheshwar Pratap v. Chandreshwar Prasad*.
 (1912) 13 Ind Cas 215 (215) 13 Cri L Jour 23 (Mad), *Ismail Ghami Annai v. Katima Rowther*.
 (1919) A I R 1919 Mad 8 (10) 49 Ind Cas 89, *Kuppusamy Chetty v. Kusala Ramiah*.
 (1874) 22 Suth W R 265 (267), *Jeebunessree Dabee v. Kristo Monce Dabee*.
 (1928) A I R 1928 Oudh 155 (189) . 103 Ind Cas 817, *Abdul Halim Khan v. Saadat Ali Khan*.
 (1925) A I R 1925 Cal 681 (683) 86 Ind Cas 677, *Sreedhar Chaudhury v. Nilmony Chaudhury*.
 (1885) 11 Cal 496 (493), *Karticknath Pandey v. Padmannund Singh*.
 (1894) 17 Mad 501 (503), *Orr v. Muthua Chetty*.
 3. (1919) A I R 1919 Mad 8 (10) 49 Ind Cas 89, *Kuppusamy Chetty v. Kusala Ramiah*.
 (1885) 11 Cal 496 (493), *Karticknath Pandey v. Padmannund Singh*.
 4. (1928) A I R 1928 Pat 260 (263, 264) 7 Pat 319 103 Ind Cas 89, *Bisheshwar Pratap v. Chandreshwar Prasad*.
 (1927) A I R 1927 Mad 61 (62) 97 Ind Cas 783, *Hari Sahib v. Shriaji Raja Sahib*.
 (1904) 2 Cal L Jour 602 (611), *Sarala Sundari Das v. Sarada Prosad Sur*.
 5. (1924) A I R 1924 Cal 118 (123) 76 Ind Cas 511, *Pantaj Mohan v. Purn Behari*.

Note 72

- 1 (1926) A I R 1926 Pat 130 (137) 91 Ind Cas 163 5 Pat 30 *Mudnasur Zamindary Co., Ltd v. Ram Kanai Singh Da.*
 2 (1888) 13 A C 794 (798) 37 W R (Eng) 433 58 L J P C 4 59 L T 677 53 J P 132, *Trustees and Agency Co., Ltd v. Sh. r.*

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Notes 72-75**

he may have abandoned his rights. But where the land consists of scanty culturable areas recovered from time to time from the river which had inundated them and it does not pay the owners to devote their attention to working it, it cannot be supposed that the owners have, by not cultivating it, abandoned their rights to it.³

73. Confiscation and re-grant. — By the order of confiscation in Oudh, all titles to the lands confiscated were put an end to and the same were vested in Government. Where the Government made a re-grant of such estate to A and A sued for possession within twelve years thereof, it was held that the suit could not be barred by limitation.¹

74. Revenue sale — Adverse possession against purchaser. — A certain property was sold at a Revenue sale under the Bengal Land Revenue Sales Act, 11 of 1859 in consequence of the non-payment of the Government assessment, and was purchased by X. The sale took place in January 1891. The defendant claimed that he was in adverse possession of the property against all persons having claims since 1859, and that the suit was barred. It was held that what was sold in the Revenue sale was not the interest of the defaulting owner, but the interest of the Crown subject to the payment of the Government assessment, and that therefore the time limited by the Limitation Act commenced to run only from the date of the sale and that the suit within twelve years thereof was not barred.¹

75. Dispossession of wrongdoer by another, if interrupts adverse possession. — It has been seen in Note 64 *ante* that where there is a break in the continuity of adverse possession, the result is that the possession automatically reverts in the owner and that no act is necessary on his part to bring about such reversion. As has been stated in *Trustees & Agency Co., Ltd. v. Short*,¹ if an intruder without title holds possession for less than the statutory period and then abandons possession and there is then *no person against whom the rightful owner can bring his action*, the rightful owner is in the same position as if no intrusion had taken place, and, although he is out of possession for the statutory period and another intruder subsequently takes possession but does not hold for the statutory period, the title of the rightful owner is unaffected by the statute. There is no difference in principle between a break in continuity

3. (1906) 1906 Pun L R No. 153, *Amir Muhammad Shah v. Sultan Khan*.

Note 73

1. (1901) 21 All 1 (11, 12) 23 Ind App 163. 8 Sar 65 (PC), *Maqbul Husam v. Lalita Prasad*.

Note 74

1. (1914) A I R 1914 P C 82 (83) 25 Ind Cas 309 (P C), *Surja Kanta Acharjya v. Sarat Chandra Roy*.
[See also (1921) A I R 1921 Cal 697 (696) 65 Ind Cas 866, *Secretary of State v. Wazed Ali Khan*.]

Note 75

1. (1898) 37 W R (Eng) 433 (431) 13 A C 793 59 L J P C 4 : 59 L T 677 : 53 J P 132.

caused by the *voluntary abandonment* by the wrongdoer and a break in the continuity caused by extraneous circumstances.

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Suppose now that a person in adverse possession is, before he has prescribed for the statutory period, himself dispossessed by another person without title. It is clear that such dispossession is an interruption of the possession of the first wrongdoer. But it is also clear that there is no interval in which it can be said that there is no person against whom the rightful owner can bring an action for possession. The possession does not become revested in the rightful owner, and the dispossession of the first wrongdoer by the second is not a dispossession of the true owner.² Thus, where *A* entered on *B*'s property under a title consistent with that of *B*, but his possession became subsequently adverse to *B*, and while in such possession he was dispossessed by *C*, a trespasser, it was held that *C*'s dispossession of *A* was not a dispossession of *B*, that the suit by *B* for possession was not a suit based on dispossession (*A*'s entry having been consistent with *B*'s title) but one governed by Article 144 of the Act.³ It was, however, held in the undermentioned cases⁴ that when the possession passes from the first to the second trespasser, there is a *constructive restoration, even if a momentary one*, of the true title to possession. If it is meant by this that possession momentarily reverts in the true owner at the time of dispossession by the second trespasser, it is submitted that the view does not seem to be correct.

As to the effect of dispossession by the second trespasser of the first trespasser on the applicability of Articles 142 and 144 to a suit by the owner for possession, see Note 92 *infra*.

76. Possession must be open.—It would follow from what has been said in Note 16 *ante*, that one of the essential elements for the acquisition of title by adverse possession is that the possession

2. (1910) 8 Ind Cas 639 (643) : 35 Bom 79, *Vasudeo Atmaram v. Eknath Balakrishna*.

[See also (1910) 8 Ind Cas 1095 (1095) (All), *Ram Laxman Rai v. Gajadhar Rai* (Person entering without title, on the property of deceased person, dispossessed by second trespasser—Suit by true heir held governed by Art 144 as heir was never dispossessed by anybody.)

(1921) A I R 1921 Bom 48 (48) 45 Bom 570 59 Ind Cas 805, *Ramchandra Balwant v. Balaji Ganesh*

3. (1910) 8 Ind Cas 639 (643) 35 Bom 79, *Vasudeo Atmaram v. Eknath Balakrishna*

4. (1926) A I R 1926 Oudh 313 (314) 29 Oudh Cas 131 92 Ind Cas 825, *Sukhdoo v. Mt. Ram Dulari*

(1922) A I R 1922 Cal 176 (177) 50 Ind Cas 602, *Jarabai Nath Sala v. Eknath Nath*

(1933) A I R 1933 Cal 893 (900) 60 Cal 1052 148 Ind Cas 1177, *Abdul Latif v. Hamed Gazi*.

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of the wrongdoer must be open.^{1a} An open possession is a possession which is overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening.¹ It is not necessary to prove actual knowledge on the part of the owner of the adverse possession.² In *Secretary of State for India v. Debendra Lal*,³ where

Note 76

1a (1934) A I R 1934 Pat 61 (65) : 150 Ind Cas 896, *Bajrath Mandar v. Ram Adhin Ray*.

(1935) 164 Ind Cas 61 (63) : 62 Cal 921 (926), *Upendranath Ray v. Jitendranath Kundu*. (Where the assertion of right is secret and not open, the possession cannot be held to be adverse.)

1. (1934) A I R 1934 P C 23 (25) : 147 Ind Cas 545 : 61 Ind App 78 : 61 Cal 262 (P C), *Secretary of State v. Debendra Lal*.

(1915) A I R 1915 Lah 298 (299) : 27 Ind Cas 610, *Khuda Bakhs v. Kar-mun*.

(1933) A I R 1933 Lah 25 (27) : 13 Lah 677 : 140 Ind Cas 604, *Shiromani Gurdwara Parbandhak Committee, Kosakotla v. Prem Das*. (Mahant getting mutation effected in his name by ex parte decree—Not a sufficient overt act.)

(1938) A I R 1938 Lah 6 (8) : 170 Ind Cas 994, *Mt. Shanti Devi v. Mani Singh*.

(1937) A I R 1937 Rang 180 (182). 171 Ind Cas 643, *Dashir Ahmed v. Maatschappij*.

Kundu.
 (1936) 163 Ind Cas 897 (902, 903) : 63 Cal 300 (313, 314, 316), *Surendra Kumar Roy Chowdhry v. Ahmed Nawab Choudhury*.

(1912) 13 Ind Cas 467 (468) (Mad), *Veeranna v. Chelamayya*.

(1938) A I R 1938 Pat 220 (222) : 175 Ind Cas 202, *Gopiram Ramchandra Firm v. v. Nitas Lal*: (Sub-lessee, instead of growing crops, erecting head works of colliery—Held sub-lessee's possession was open and public and hence adverse to the landlord.)

(1934) A I R 1934 Oudh 21 (23) : 147 Ind Cas 805, *Mahomed Mahmud v. Mahomed Afag*.

(1912) 13 Ind Cas 467 (468) (Mad), *Veeranna v. Chelamayya*.

(1938) A I R 1938 Oudh 238 (246) : 177 Ind Cas 718, *Musahab Khan v. Raj Kumar Bakshi*.

(1933) A I R 1933 Nag 27 (27) : 28 Nag L R 282 : 140 Ind Cas 831, *Mura-duddin v. Mt. Umraobi*.

(1935) A I R 1935 Cal 760 (761, 762) : 150 Ind Cas 752, *Bhabani Prosanna v. Manendra Chandra*

(1935) A I R 1935 All 265 (267) : 153 Ind Cas 893, *Chanar Singh v. Chanar Singh*

(1909) 8 Ind Cas 431 (432) (Cal), *Darash Badri Sahi v. Chamra Uraon*

(1938) A I R 1938 Lah 6 (8) : 170 Ind Cas 994, *Mt. Shanti Devi v. Mani Singh*

[See (1933) A I R 1933 Nag 112 (113) : 29 Nag L R 48 : 144 Ind Cas 696, *Jai Krishna v. Babu* (Possession to the knowledge of the plaintiff and in contravention of his right is clearly adverse to him.)]

3 (1934) A I R 1934 P C 23 (25) : 147 Ind Cas 515 : 61 Ind App 78 : 61 Cal 262 (P C).

A claimed a title by adverse possession against the Crown and the latter pleaded that it had no knowledge of the adverse possession of A, their Lordships of the Privy Council observed as follows -

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"Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. If the rights of the Crown have been openly usurped, it cannot be heard to plead that the fact was not brought to its notice"

It has been held in some cases⁴ that knowledge is necessary on the part of the true owner in order to constitute the wrongdoer's possession adverse. In view of the clear pronouncement of their Lordships of the Privy Council in *Debendra Lal's case*³ above referred to, the view expressed in the said cases cannot, it is submitted, be considered to be correct.

Where A sued for possession of underground mining areas in which the defendant was carrying on mining operations, and to which the plaintiff claimed title and proved it, it was held that the defendant must, in order to show adverse possession for the statutory period, prove that the possession was open—i.e. that "there was that to be seen on the surface which the plaintiffs' predecessor, being reasonably vigilant, ought to have seen, and so seeing would have been put on their guard, although they did not have any title to the surface"⁵

⁴ (1879) 3 Bom 452 (520, 784, 785), *Bhaskarappa v Collector of North Kanara*

(1935) A I R 1935 Bom 98 (100, 101) 156 Ind Cas 339, *Daluchand v Shanti*. (Word 'adverse' in Article 144 connotes something similar to knowledge)

(1927) A I R 1927 Nag 104 (106) . 22 Nag L R 175 . 100 Ind Cas 446, *Mt. Deshrani v. Kishore Singh*.

(1932) A I R 1932 Oudh 46 (48) . 7 Luck 250 . 137 Ind Cas 678, *Suraj Bali v. Mahadev Prasad*

(1920) A I R 1920 Cal 203 (204) . 56 Ind Cas 811, *Manulla Kolu v Prasanna Kumar Sarkar*

(1929) A I R 1929 Oudh 402 (405) . 119 Ind Cas 866, *Mubimudnissi v. H. Hossain*

(1913) 21 Ind Cas 204 (207) (Cal) *Radha Madhab Naran v. Milan Mahate*.

(1926) A I R 1926 Oudh 313 (315) . 29 Oudh Cas 131 . 92 Ind Cas 825, *Sulhdeo v. Mt. Ramdulari*

(1871) 15 Suth W R 191 (191) . 6 Beng L R App 151, *Dhanuk Dhar Singh Gopi Singh*.

[See (1927) A I R 1927 Oudh 448 (449) . 104 Ind Cas 394, *Ashraf Ali v. Sakhanat Hussain* (Adverse entry in khewat will not set time running against person unless he has notice)]

(1924) A I R 1924 Pat 213 (214) . 2 Pat 839 . 75 Ind Cas 955 *Ramanadhan Sahay v. Jaijoud Pandey*]

[See also (1907) 34 Cal 753 (774) . 5 Cal L Jour 583 . 12 Cal W N 193, *Brajnath Bose v. Durga Pershad Singh*]

⁵ (1935) A I R 1935 P C 86 (39) . 153 Ind Cas 929 . 14 Pat 327 . 62 Ind App 40 (P C), *Srischandra Nandy v. Bijnath Jugalkar*

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See also the undermentioned case.⁶

77. Adverse possession against minor or lunatic.—It has been seen in Note 32 to Section 6 *ante* that the mere fact that a person is a minor or lunatic will not prevent limitation from running against him although he will be entitled to an *extended* period of limitation. Hence, although a property may belong to a minor or lunatic, if such property is in the adverse possession of another, limitation will run in the latter's favour.^{1a} But the question arises whether there can be adverse possession against a minor or lunatic. In *Seetharamaraju v. Subbaraju*,¹ their Lordships of the Madras High Court observed as follows:

"We do not think it can be stated as a general proposition that there could be no adverse possession of property which belongs to a lunatic or minor during the continuance of the lunacy or minority of the owner.

"The question has in each case to be decided with reference to the anterior relationship between the person taking possession and the minor or lunatic, and to whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would in law make him only an agent or bailiff of the minor or lunatic.

"... It seems to us from the provisions of the Limitation Act that lunacy or minority would not by itself prevent limitation from running as against a lunatic or minor and that in cases where it is clear that the person entering into possession was under no duty to the lunatic or minor and entered into possession for his own benefit and in assertion of a title hostile to that of the lunatic or minor, limitation would begin to run from the date when he so took possession, though the lunatic would be entitled to file a suit within three years from the date when his disability ceases"

It has been seen that in the case of co-owners, there can be no adverse possession by one of them against the others unless there is a denial of their title to their *knowledge*. Suppose the co-owner against whom adverse possession is claimed is a minor. Can there be a denial of his title to his knowledge? In *Jagannath v. Chandni Bibi*,² Mookerjee, J., observed as follows: "Apart from this, we have

6. (1912) 13 Ind Cas 467 (468) (Mad), *Veeranna v. Chelamayya*. (If the possession of the defendant is of an ineffective character such as by tying cattle, assuming that its character could be improved by an assertion of title made to the owner's knowledge, it is necessary for the defendant to show that the owner had knowledge of such assertion or that it was made under circumstances which would imply that he must have had knowledge.)

Note 77

1a See (1893) 1893 Bom P J 97, *Baya v. Babaji*.

1. (1922) A I R 1922 Mad 12 (15); 45 Mad 361; 70 Ind Cas 678.

2 (1921) A I R 1921 Cal 647 (651); 67 Ind Cas 31.

the important circumstance that in this case the rightful owner, the second plaintiff Ramnibas, who, when a child a few months old, was taken in adoption in 1892, was a minor till at least 1910, it is thus difficult to appreciate how the contesting defendants began to hold adversely to the knowledge of the infant in 1901." It is submitted that by his above remarks the learned Judge cannot have intended to lay down as a general proposition that minority necessarily excludes knowledge. The question must be one depending on the age of the minor and other circumstances in each case.³ It cannot be said that minority in itself negatives knowledge.⁴

Although, thus, the minority or insanity of the owner does not prevent limitation from running against him or possession from becoming adverse against him, he will be entitled to an *extended* period of limitation under the provisions of Sections 6 and 8 *ante*.⁵

Article 44 *supra* applies to a suit by a minor to set aside an alienation of his property by his guardian where such alienation is voidable.^{6a} But where the alienation of a minor's property is void, Article 44 does not apply.⁶ (See Notes to Article 44.) In such a case, the remedy of the minor will be by a suit for *possession* where the alienee has taken possession under colour of the transfer. It is conceived that the Article applicable to such a suit will be Article 142. (See Note 60 *ante*.) Hence, it is submitted that the undermentioned decisions,⁷ in which it was held that Article 144 will apply to such cases, are not correct.

78. Possession is not adverse to person not having a present right to possession.—Adverse possession is possession which is in contravention of the right of another to such possession. Hence, possession cannot be adverse against a person who is not entitled to

- 3 (1932) A I R 1932 Bom 23 (24) 184 Ind Cas 366, *Shidlingai v Rajata*
4. (1920) A I R 1920 Mad 793 (798, 800) 52 Ind Cas 725, *Narasimha v Krishnachandra*.
- (1924) A I R 1924 P O 187 (141) 48 Bom 411 51 Ind App 220 79 Ind Cas 971 (P O), *Kalyandappa v. Chanbasappa*.
5. (1903) 1903 Pun L R No. 51, *Dasant v. Indar*.
- 5a (1936) A I R 1936 Mad 346 (347) 161 Ind Cas 797 59 Mad 549, *Anlamma v Kameshtaramma*.
6. See (1915) A I R 1915 Nag 52 (55) 12 Nag L R 12 32 Ind Cas 242, *Aswam v. Ratansingh*
- (1921) A I R 1921 Cal 572 (573) 62 Ind Cas 428, *Laloo Karikar v Jajat Chaudia Saha*
- (1927) A I R 1927 Nag 145 (147) 99 Ind Cas 1050, *Mahadeo v. Somaji*.
- (1919) A I R 1919 Cal 154 (155) 49 Ind Cas 118, *Aftabuddin v. Pro'ash Chunder Soot*
- 7 (1879) 5 Cal 363 (370, 378) 5 Cal L R 374 5 Ind Jur 200, *Sekher Chund v. Dulputy Singh*
- (1914) A I R 1914 Nag 75 (76, 77) 10 Nag L R 133 26 Ind Cas 813 *Husen v Rajaram*
- (1918) A I R 1918 Nag 20 (22) 15 Nag L R 55 51 Ind Cas 943, *Iskhu v Devidas*
- (1931) A I R 1931 Rang 178 (178) 134 I C 214, *Ranga Khan v. Ma Chai*.
- (1926) A I R 1926 Mad 457 (461) 49 Mad 76 92 Ind Cas 827, *Seetharamamma v Appiah*

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Notes 77-78

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Note 78**

possession.¹ Thus, where *A* is entitled to a life-estate in certain land and *B* is entitled to the remainder, the possession of a transferee from *A* does not become adverse to *B* before *A*'s death.² *A* is entitled to a vested interest in a house but not to possession of it during the lifetime of *B*, a widow, who is entitled to possession in virtue of a right of residence. *A* transfers his rights to *C*. The possession of the widow is not adverse to *C* as his right to possession accrues only after the widow's death.^{2a} See the undermentioned cases³ for other instances.

Note 78

1. (1928) A I R 1928 All 726 (730) : 50 All 986 : 118 Ind Cas 177 (F B), *Sohan Lal v. Mohan Lal*.
 (1878) 4 Cal 327 (329, 331) : 2 Shome L R 106, *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee*.
 (1902) 26 Bom 617 (621) : 4 Bom L R 312, *Balkrishna v. Goind*.
 (1912) 17 Ind Cas 642 (644) : 37 Bom 64, *Babaji Akoba v. Dattu Larman*.
 (1871) 16 Suth W R 270 (270), *Kabul Krishna Dass v. Mohessuree Debia*.
 (1937) A I R 1937 Cal 343 (345) : 173 Ind Cas 439, *Narattam Day v. Deben-dra Lal Khan*.
 (1865) 1885 Pun Re No. 36, *Sheoji v. Dhan Singh*.
 (1916) A I R 1916 Pat 93 (94) : 37 Ind Cas 107 : 1 Pat L Jour 293, *Narupraja Singh v. Bhabani Teli*.
 (1890) 1890 Bom P J 107, *Keshav v. Gopalrao*.
 (1909) 2 Ind Cas 57 (59) : 12 Oudh Cas 45, *Pratap Bahadur Singh v. Mahe-tar Baksh Singh*.
 (1911) 9 Ind Cas 791 (794) : 35 Mad 231, *Parthasarathy Naicken v. Laksh-mana Naicken*.
 (1911) 9 Ind Cas 300 (302) : 1911 Pun Re No. 26, *Sundar v. Salig Ram*.
 (1916) A I R 1916 Mad 990 (997) : 39 Mad 811 : 31 Ind Cas 412 (F B), *Vya-puri v. Sonamma Dos Ammani*.
 2. See (1875-77) 1 Bom 535 (Note) (537), *Babaji v. Nama*.
 (1921) A I R 1921 Cal 687 (696) : 65 Ind Cas 866, *Secretary of State v. Wazed Ali Khan*.
 2a. (1928) A I R 1928 Cal 250 (252), *Ambika Prosad Doss v. Annada Prosad Dass*.
 3. (1928) A I R 1928 Cal 250 (252), *Ambika Prosad Doss v. Annada Prosad Dass*.
 sold the property more than 12 years before his return, held that for a suit by plaintiff against vendee, limitation began only on return from Port Blair.)
 (1901) 14 Mad 495 (498), *Kuttyassan v. Mayan*. (Gift of life interest by Kar-navan—Suit for possession by succeeding Karnavan—Time runs from the death of the grantee)
 (1930) A I R 1930 Pat 562 (564) : 127 Ind Cas 835, *Muchi Ram Bagal v. Balaram Dhumij*. (Possession of under-raiyat for life—When becomes adverse to landlord.)
 (1918) 22 Ind Cas 575 (575, 576) (Cal), *Depin Dehari Chakladar v. Jagat Kishore Achary*. (Suit for possession of property allotted in partition—Time begins to run when the property was allotted)
 (1884) 8 Bom 585 (590, 591), *Tuharam v. Sujangir Gurni*. (Vatan lands attached by Peshwas—Continuance of attachment under, and subse-quent redemption by, British Government—Possession by defendant as tenant to Government, if adverse—Plaintiff's incompetency to sue during attachment and resumption)
 (1915) A I R 1915 Mad 217 (221) : 24 Ind Cas 519, *Chattan Rajah Avergal v. Raman Varma*. (Adverse possession against a 'stani' in Malabar who holds only for life will not bar next 'stani' when succession opens.)

79. Adverse possession against holder of life-estate.—Where *X* holds only a life-estate in certain property, *Y*, the person entitled to succeed to the property on the death of *X*, cannot be said to have any right to the possession of the property till the death of *X*. There can, consequently, be no adverse possession against *Y* till he becomes entitled to possession on the death of *X*. For, as has been seen in Note 78 *ante*, a possession is adverse to *A* if it is in contravention of the title of *A* to such possession, and there cannot be any such contravention when *A* is *not entitled to possession at all*. Articles 140 and 141 *ante*, are based only on this principle and time is accordingly made to run against the person entitled to succeed on the termination of a previous estate, from the time when such person becomes entitled to possession, and a suit by such person for possession against the defendant who had entered into wrongful possession during the lifetime of the holder of the life-estate would be governed by Article 144, time running from the death of the latter¹. See also Note 13 to Article 141 and Note 2 to Article 140.

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Note 79

- (1928) A I R 1928 Lah 250 (255) · 113 Ind Cas 53, *Zinda v Mt Roshnai* (Where a property is mortgaged for a fixed term and on the death of the mortgagor the guardian of his minor son makes an unauthorized sale of the property and the purchaser redeems the mortgage *prematurely*, the plea of adverse possession by the purchaser cannot stand as the time begins to run against the true owner after the date of the fixed mortgage has expired.)
- (1928) A I R 1928 Oudh 273 (274) · 3 Luck 459 · 112 Ind Cas 481, *Ram Ratan Lall v. Aditya Prasad*. (Where certain property was under a usufructuary mortgage and was in the possession of the mortgagee and the mortgagor sold the property by a duly executed sale-deed, the equity of redemption passes to the vendee and any subsequent repudiation of the sale deed by the vendor or assertion that he was still the owner will not amount to any adverse possession against the vendee and the vendee's rights will not be barred by limitation merely because twelve years lapse from such repudiation of vendee's title or assertion of vendor's title, the property all along continuing in the possession of the mortgagee.)
- (1922) A I R 1922 Nag 16 (17) · 65 Ind Cas 362, *Manohar v Laxman* (Where the lessor was adopted into another family, *held* that assuming that

defendant—Order conferring lease on defendant stated that plaintiff could recover the putnee after 15 years.—After 15 years of his ejection plaintiff sued defendant for possession.—Defendant pleaded adverse possession for over 12 years.—*Held*, there was no adverse possession.)

- (1931) A I R 1931 Lah 439 (440) · 131 Ind Cas 105, *Salkhu v Malku*, (Where the sale is voidable at the instance of reversioner, it is good for the lifetime of the alienating proprietor (under Punjab Customary Law) and the possession of the vendee can become adverse only after the death of the vendor.)
- (1913) 19 Ind Cas 222 (224) · 1913 Pun Re No 19, *Paras Ram v Nathu Mal* (Do.)
- (1911) 11 Ind Cas 93 (94) (Oudh) *Bhagwandas v Ishar Dal* (Possession of widow is not adverse to the reversioner.)

Note 79

1. (1895) 10 C P L R 78 (79) *Sectatam Brahm v Ran Pharo Patwar*.

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Notes 79-80**

Where, however, adverse possession has begun against a person *through whom the plaintiff claims*, the interposition of a life-estate will not stop time running against the plaintiff : see Note 14 to Article 141.

Alienation by holder of life-estate.—The possession of an alienee from the holder of a life-estate only in the property alienated, cannot also, on the principles stated above, be adverse to the person entitled to possession on the termination of the life-estate, till the estate falls into possession.²

See also Note 60a, *ante*.

80. Adverse possession of trust property by stranger.—The exemption from limitation under Section 10 of the Act applies only to a suit against a trustee or his legal representatives or his assigns (not being assigns for valuable consideration). The exemption does not apply to a suit against a *stranger* to the trust who is in possession of the trust property claiming it to be his own property. Such possession will be adverse to the trust and a suit for possession against the stranger after twelve years from the commencement of the adverse possession will be barred by limitation.¹

Where, however, the stranger does not deny the trust or remove the trust properties from the objects of the trust and claims to be a trustee himself and takes possession of the trust properties *as such trustee*, his possession will not be adverse to the *trust itself*, but will be adverse to the trustee, and after twelve years of such possession he will acquire the right of a trustee. In *Balwant Rao v. Puran Mal*,² it was observed by their Lordships of the Privy Council as follows :

“When property is used for some purpose other than the proper purpose of the trusts in question, it may be recovered without any bar of time, from the hands of the persons indicated in the Section (Section 10). But here there is no question of recovering the property for the trusts of the endowment, because the defendant admits that he is a trustee and says that he is

(1919) A I R 1919 Nag 52 (53) : 59 Ind Cas 473, *Mahomed Sirajuddin v. Fayazuddin*. (Such Inamdars have only life interest—Hence an alienee from such Inamdar cannot plead adverse possession against the next holder, on the basis of such alienation.)

Note 80

1 (1855) 16 C B 652 (670) . 21 L J C P 187 . 1 Jour (N S) 759 : 3 W R (Eng) 595 100 R R 871, *Melling v. Leah*.

(1731) 3 P Wms 309 (310) 21 E R 1078, *Wyck v. East India Co.*

(1916) A I R 1916 Mad 130 (135) 80 Ind Cas 669, *Muruga Chetty v. Rajaswamy*. (But a stranger allowed to be in possession by a trustee—his possession will be permissive and not adverse)

2. (1883) 6 All 1 (9) : 13 Cal L R 39 : 10 Ind App 90 : 7 Ind Jour 329 : 4 Sar 435 (P C)

applying the property to the trusts of the endowment. There is no evidence that he is not applying the property to the trusts of the endowment, and there is no reason to conclude that the property would be more applied to those trusts if the plaintiff were to succeed in his suit than it is at this moment. The plaintiff is suing only for his own personal right to manage or in some way to control the management of the endowment. The consequence is that the case does not fall within Section 10 of the Limitation Act. If it does not, then it must be within one of the Articles of the Schedule."

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Notes 80-83**

81. Adverse possession against one co-trustee, if adverse to the other.—Where there are two co-trustees and one of them who is in management for the time being is dispossessed, and the trespasser continues in possession for a period of twelve years, it has been held that the right of the alienor trustee as well as the right of the other co-trustee will be barred even though the latter had been a minor at the date when the adverse possession began, and the suit is filed within three years of his attaining majority.¹

82. Adverse possession against co-owners.—Where one co-owner who is in possession on behalf of all of the co-owners is dispossessed by a stranger, the possession of such stranger is adverse to all the co-owners.¹

The adverse possession by a stranger against the co-owners of a property is not interrupted by a partition among the co-owners.²

83. Adverse possession against widow is not adverse against subsequently adopted son.—Where *A*, a Hindu male, adopts *B* as his son, *B* does not get any immediate right to possession of the properties of *A*. But, for purposes of limitation the period of adverse possession against *A* will have to be taken into account against *B* also, since *B* derives his right to sue from *A*.

Where a Hindu widow makes an adoption of a son to her deceased husband, the adopted son does not claim through the widow but becomes entitled to the property of the adoptive father as his heir, on the date of adoption. On the principles stated in Note 78 *ante*, adverse possession against the widow will not be adverse against the adopted son.¹ It will become adverse to him only from the date

Note 81

1. (1910) 6 Ind Cas 992 (993) 34 Mad 284, *Thiagaraja v Rathnasabapathy Pillai*

Note 82

- 1 (1919) A I R 1919 Cal 55 (56) 50 Ind Cas 870, *Abdul Sot in v Laxmi Prasad Agarwalla*
(1927) A I R 1927 Cal 457 (458) 100 Ind Cas 507 *Mansuddi v Md Ezzat Ali*
2 (1920) A I R 1920 Oudh 147 (150) 60 Ind Cas 717, *Fazl Haj v Lu, wai Khanam*

Note 83

1. (1925) A I R 1925 Bom 402 (403) 49 Bom 604 89 Ind Cas 62 *Hannant Subbaya v Krishna Manjunath*

Arts. 142 & 144 of his adoption, when, for the first time, he becomes entitled to possession.²

Notes 83-84

A suit by the adopted son for possession of the properties of the adoptive father from a person who has entered into possession before the date of the adoption, whether as an alienee or as a wrongdoer, would be governed by Article 144 and not by Article 142.³ The reason is that at the time of the entry, the defendant could not be said to have entered on the property in *contravention* of the title of the plaintiff, inasmuch as the plaintiff had no title at all on that date to such possession.

Article 119 has no application to a suit by the adopted son for possession of the adoptive father's property, as the adopted son is not bound to sue for any declaration such as is contemplated by that Article, before suing for possession.⁴

84. Adverse possession against mortgagor, if adverse against mortgagee.—*A* executes a mortgage in favour of *B* who has, under the terms of the mortgage, no right to the possession of the property. *C*, a trespasser, enters on the property while in the possession of the mortgagor and remains in possession for twelve years. Is the mortgagee affected by such possession? On the principles stated in Note 78 *ante*, it seems to be clear that his rights cannot become affected in any way. *C*'s possession cannot be said to be adverse to *B*, inasmuch as *B* had no right to possession on the date of *C*'s entry and there can be no possession in contravention of the title of another to such possession when such person has no title to possession. Nor can the mortgagee, in the case stated above, be said to derive his right to sue from the mortgagor as the mortgage is *prior* to the cause of action. The position would be different where *A* executes a mortgage in favour of *B* after the date of *C*'s entry into possession adversely to *A*. The extinguishment of the title of *A* by the adverse possession of *C* will operate to extinguish *B*'s mortgage also. The reason is that *B* is a person claiming through *A* in respect of the cause of action

(1905) 2 Cal L Jour 87 (94, 96) : 9 Cal W N 75, *Harek Chand Babu v. Bejoy Chand Mahatab*.

(1900) 2 Bom L R 411 (414), *Hari Githal v. Waman Hari*

(1928) A I R 1928 Oudh 155 (189, 190) : 108 Ind Cas 817, *Abdul Halim Khan v. Saadal Ali Khan*. (Prescription does not run against a person who is either unable to act or is non-existent. Therefore in the case of an adopted son limitation does not run prior to adoption.)

[But see (1889) 13 Bom 276 (278), *Krishnaji Janardhan v. Morbhat*. (Not good law.)]

2. (1905) 9 Cal W N 233 (233) (s N), *Harek Chand v. Bejoy Chand Mahatab*.

(1921) A I R 1921 Nag 111 (111) : 17 Nag L R 18, *Sitaram v. Rajaram*. (Suit by adopted son against adverse possessor before adoption.)

3 (1921) A I R 1921 Nag 111 (111) : 17 Nag L R 18, *Sitaram v. Rajaram*.

(1925) 19 Bom 809 (814, 815, 818, 819), *Moro Narayan v. Dalaji Raghunath*. (Per Candy, J.)

4. (1909) 1 Ind Cas 647 (649) : 33 Bom 88, *Ram Krishna v. Tripurabai*.

(1903) 1903 All W N 163 (166) : 26 All 40, *Chandania v. Salig Ram*.

See also Notes to Articles 118 and 119, *ante*.

against *C* and will be bound by the adverse possession against *A*.^{1a}

Arts. 142 & 144
Note 84

In *Karan Singh v. Baker Ali Khan*,¹ it seems to have been assumed that Article 144 would apply to a suit by the mortgagee to enforce his rights in such cases. The facts of the case were that *A* made a mortgage of his property to *B* in 1862. But before that date, in 1861, the Collector had taken possession of the property in order to secure the Government revenue and retained it till 1863 when he handed over possession to *C*, a rival claimant to the property, who, however, was found not entitled to it. *B* brought a suit for sale on his mortgage in 1874. *C* contended that his possession from 1863 must be tacked on to the Collector's possession which began in 1861 and that therefore the suit was barred by limitation. Their Lordships held that no such tacking could be allowed and that the suit was within limitation. The suit having been brought within twelve years both from the date of the cause of action on the mortgage and from the date of *C*'s entry into possession, it was unnecessary to decide the question of adverse possession. Further, the adverse possession having begun prior to the date of the mortgage, the plaintiff would be bound by such adverse possession against *A* and the suit would therefore be governed by Article 144. *Karan Singh's case*¹ was distinguished on the above ground in *Raj Nath v. Narain Das*,² decided by a Full Bench of the Allahabad High Court. A Full Bench of the High Court of Madras has also held, distinguishing *Karan Singh's case*,¹ that where a person enters adversely into possession of the property of a mortgagor, the mortgage being simple, his possession is not adverse to the mortgagee who is not barred from suing on his mortgage by reason of such adverse possession.³ See also the under-

Note 84

- 1a (1912) 17 Ind Cas 632 (634) 34 All 640, *Nandan Singh v. Juman*
(1930) A I R 1930 Cal 318 (315) 126 Ind Cas 257, *Surendra Nath v. Barisal Loan Co. Ltd.*
(1902) 25 All 35 (37, 38) : 1902 All W N 175, *Ram Lal v. Musum Ali Khan*,
(1899) 23 Mad 37 (39) : 9 Mad L Jour 258, *Nallamuthu Pillai v. Detha Naicken*
(1895) 18 Mad 342 (316), *Subbaramayyar v. Nigamadullah Sahib* (In this case mortgage effected after the title of the mortgagor was extinguished by adverse possession)
(1928) A I R 1928 Lah 499 (502) 110 Ind Cas 18, *Tara Singh v. Tara Saran*.
(1897) L R 2 Q B 143 (158) 66 L J Q B 705 77 L T 846 46 W R (Frg) 56, *Thornton v. France*.
(1920) A I R 1920 Nag 279 (280) 52 Ind Cas 933 15 Nag L R 151 *Mt. Amrbi v. Khaja*
(1917) A I R 1917 Mad 228 (230) 33 Ind Cas 326 39 Mad 959, *Ponnam Subbiah v. Ram Reddi*
(1911) 9 Ind Cas 900 (901) (All), *Lajunath v. Bladayan*
(1870) 2 N W P H C R 223 (224), *Sheoamber Sahu v. Dhanoo Chandra Kulnar*.
1. (1882) 5 All 1 (5, 7) 9 Ind App 29 4 Bar 382 5 Shome L R 50 (P C).
2. (1914) A I R 1914 All 93 (96) 86 All 567 24 Ind Cas 17 (F I) 17 All 1 (P C).
3. (1916) A I R 1916 Mad 900 (906) 33 Mad 111 1 Ind Cas 412 (F I), *Vijayapur v. S. Ramiah Iyer*

Arts. 142 & 144 mentioned cases⁴ in which the same principle has been applied.
Notes 84-85

85. Adverse possession against mortgagee, if adverse to mortgagor.—Where the mortgagee is not entitled to possession under a mortgage and the mortgagor continues in possession after the mortgage, it is clear that the possession of a trespasser who dispossesses the mortgagor is adverse to the mortgagee. Even where the mortgagee is entitled to possession of the property, the mortgagor may be entitled to receive a portion of the rents and profits of the property under the terms of the mortgage. Where, in such a case, a third person interferes with the right of the

4. (1918) A I R 1918 Cal 933 (935) : 44 Cal 425 : 87 Ind Cas 277, *Priya Sakhi Devi v. Breshwar Samanta*.
 (1912) 17 Ind Cas 632 (634) : 34 All 640 : *Nandan Singh v. Jumman*.
 (1911) 9 Ind Cas 791 (794) : 35 Mad 231, *Parthasarathy Naicken v. Lakshmana Naicken*.
 (1938) A I R 1938 Pat 189 (190) : 175 Ind Cas 279, *Ramasray Prasad v. G. G. Atkins* (Invalid lease by mortgagor after mortgage—Lessce's possession is not adverse to mortgagee)
 (1914) 22 Ind Cas 94 (95) : 9 Nag L R 191, *Nazar Ali v. Hraman*. (The principle is equally applicable to the case of a mortgagee by conditional sale not entitled to possession.)
 v. *Annada Prasad*.
 308 : 77 Ind Cas 125, *Jai*
- (1930) A I R 1930 Cal 313 (315) : 126 Ind Cas 257, *Surendra Nath v. Barisal Loan Co. Ltd.*
- (1924) A I R 1924 Cal 600 (609) : 79 Ind Cas 520, *Dwijendra Narain Roy v. Joges Chandra De*
- (1906) 33 Cal 1015 (1019) : 10 Cal W N 904, *Aimadar Mondul v. Makhan Lal Dey*.
- (1929) A I R 1929 Pat 577 (579) : 121 Ind Cas 471, *Mohan Bhakat v. Jagdayan Pandey*.
- (1931) A I R 1931 Pat 64 (67) : 10 Pat 234 : 130 Ind Cas 257, *Ghanshyam Das v. Ragho Singh*.
- (1928) A I R 1923 Mad 160 (161) : 99 Ind Cas 831, *Sundaram Iyer v. Thiagaraya Pillai*.
- (1922) A I R 1922 Cal 32 (35) : 69 Ind Cas 841, *Sital Chandra Majhi v. Parbati Charan Chakrabarti*.
 *Venkatakrishna Moorthy*
 ovided that the mortgagee
 default by the mortgagor in
 gal possession is not with
 the mortgagee and the possession of a trespasser is not adverse to him.)
- (1901) 2 K B 96 (100) : 70 L J K B 552 : 84 L T 485 : 49 W R (Eng) 465 : 17 T L R 397, *Ludbrook v. Ludbrook*
- (1909) 2 Ind Cas 57 (62) : 12 Oudh Cas 45, *Pratap Bahadur Singh v. Maheshwar Daksh Singh*
- (1923) A I R 1923 Pat 305 (306) : 69 Ind Cas 641, *Kunj Lal v. Kanhai Mahto*.
- (1919) A I R 1919 Cal 716 (717) 50 Ind Cas 304, *Kali Krishna v. Tara Prasanna*.
- (1890) 7 Cal 391 (400), *Manly v. Patterson*
- (1937) A I R 1937 Pat 13 (14) : 15 Pat 372 : 166 Ind Cas 312, *Narayan Prasad v. Adarmani Dasu*.
- (1927) A I R 1927 All 309 (310) : 100 Ind Cas 294, *Sami Nath Singh v. Thakur Prasad Rai*. (Transferee pendente lite cannot prescribe title by adverse possession against mortgagee auction purchaser till he is entitled to actual possession.)
- (1901) 1901 Pun Re No. 10 : 1901 Pun L R No. 81, *Kasar Singh v. Thakur Das*.

mortgagor and receives the rents and profits in assertion of a hostile title, such third person must be held to be in adverse possession of the mortgagor's equity of redemption.¹ But suppose, that the mortgage is with possession and the mortgagor is not entitled to any share in the actual enjoyment of the property. In such a case, if a person dispossesses the mortgagee and enters into possession of the mortgaged property, such possession will not be adverse to the mortgagor, the reason being that possession cannot be adverse to any one who has no immediate right to possession.² But it has been held in several decisions that even in such cases the possession of a third party who dispossesses the mortgagee and enters into possession can be adverse to the mortgagor³ and that it will be adverse to him where the trespasser denies, to his knowledge, his title to the property.⁴ It is respectfully submitted that this view conflicts with

Arts. 142 & 143
Note 85

Note 85

1. (1923) A I R 1923 Pat 592 (597) : 76 Ind Cas 277, *Binanand Sawase v. Thuroo Mahto*.
- (1935) A I R 1935 All 542 (543) : 159 Ind Cas 151, *Salig Ram v. Gauri Shankar*.
- 2 (1875) 12 Bom H C R 180 (183), *Vithoba v. Ganga Ram*.
- (1935) A I R 1935 All 542 (543) : 159 Ind Cas 151, *Salig Ram v. Gauri Shankar*.
- (1935) A I R 1935 Lah 315 (316) : 16 Lah 724 : 158 Ind Cas 218, *Amar Nath v. Duni*.
- (1923) A I R 1923 Pat 592 (597) : 76 Ind Cas 277, *Binanand Sawase v. Thuroo Mahto*.
- (1929) A I R 1929 Pat 639 (640) : 9 Pat 632 : 122 Ind Cas 512, *Dubray Mahto v. Lalji Sahai*.
- (1923) A I R 1923 All 11 (12) 70 Ind Cas 959, *Durga Devi v. Girwar Singh*.
- (1925) A I R 1925 Bom 465 (466) 49 Bom 539 87 Ind Cas 765, *Tarabai Ramrao v. Datta Ram Gotind Bhai*.
- (1904) 27 All 395 (396) 1905 All W N 4 1 All L Jour 725, *Muhammad Hussain v. Mulchand*.
- (1924) A I R 1924 Cal 357 (358) 71 Ind Cas 1030, *Kamala Kanta v. Ananda Chandra*.
- (1921) A I R 1921 Bom 293 (296) : 45 Bom 661 : 60 Ind Cas 913, *Gitabai Bhan v. Krishna Malhari*.
3. (1927) A I R 1927 All 177 (180) : 99 Ind Cas 250, *Munawar Ali v. Jagamalan Ram*.
- (1894) 18 Bom 51 (54, 59), *Chinto v. Janki*.
- (1922) A I R 1922 Bom 91 (95) : 67 Ind Cas 176, *Vinayak Keshav v. Balu Shitram*.
- (1903) 27 Bom 43 (67, 68) 4 Bom L R 721, *Tarabai v. Venkat Rao*.
- (1897) 1897 Bom P J 33, *Daulata Ada v. Yesu Narasu*.
- (1889) 1889 Pun Re No. 161, *Nihal Singh v. Mutwaddi*.
- (1898) 1898 Pun Re No. 6, *Khannu Mal v. Khan Muhammad*.
- (1914) A I R 1914 Mad 374 (341) 88 Mad 903 22 Ind Cas 615 (F B), *Perrai Aiyar Ambalam v. Shunmugasundaram*. (Question depends on facts and circumstances of each case)
- (1879) 2 Mad 226 (227, 229), *Ammu v. Ramakrishna Sastri*.
- (1930) 1930 Mad W N 1143 (1151), *Veeranna v. Venkadu*.
- (1924) A I R 1924 Oudh 40 (43) 26 Oudh Cas 803 77 Ind Cas 125, *Jai Gobind Singh v. Abhai Singh*.
- (1913) 21 Ind Cas 318 (350) (Low Bur), *Maunji Shree Pe v. Ma Yu Ma*.
- 4 (1927) A I R 1927 All 177 (180) 99 Ind Cas 250, *Munawar Ali v. Jagamalan Ram*. (Trespasser denying mortgagor's title to his knowledge—Trespasser's possession is adverse against mortgagor.)

Arts. 142 & 144
Note 85

the principle that possession cannot be adverse to a person who has no present right to possession, and hence is not correct. Assuming the view to be correct, the onus of proving that the possession of a trespasser who dispossesses a usufructuary mortgagee in possession is adverse both to the mortgagor and to the mortgagee, is on the person setting up the adverse possession.⁵

Where a trespasser ousts a usufructuary mortgagee and enters into possession of the mortgaged property, the possession of the trespasser is adverse to the mortgagee and if it continues for twelve years, the trespasser will acquire the rights of the usufructuary mortgagee. The mortgagor's suit for redemption against such a trespasser will be governed by Article 148.⁶

Where a stranger pays off a usufructuary mortgage and gets into possession of the mortgaged property, he is not subrogated to the rights of the mortgagee. Hence, his possession is adverse to the mortgagor.⁷ But it has been held that where a stranger, believing in good faith that he is entitled to the equity of redemption, pays off a usufructuary mortgage, he is subrogated to the rights of the mortgagee and hence his possession of the mortgaged property is only as *mortgagee* and is not adverse to the mortgagor.⁸ (See Note 2 to Article 148, *infra*.)

Where a stranger renews a usufructuary mortgage in assertion of his own title to the equity of redemption, it has been held that from the date of such renewal the stranger will be in adverse possession of the equity of redemption against the mortgagor.⁹ It is submitted

(1928) A I R 1928 Lah 147 (147, 148) : 107 Ind Cas 612, *Hansa v. Ramlok*. (Do.)

(1903) 27 Bom 43 (68, 69) : 4 Bom L R 721, *Tarubai v. Venkantarao*. (Do.)

(1908) 30 All 119 (121) : 5 All L Jour 85 : 1908 All W N 25 : 3 Mad L Tim 125, *Ismdar Khan v. Ahamad Hussain*.

(1914)

against him.)

(1924) A I R 1924 Oudh 40 (41) : 26 Oudh Cas 308 : 77 Ind Cas 125, *Jai Gobind Singh v. Abhai Raj Singh*. (Do.)

(1930) 1930 Mad W N 1148 (1151), *Veeranna v. Venkadam*. (Do.)

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6. (1875) 12 Bom H O R 180 (182, 183), *Vithoba v. Gangaram*.

7. (1926) A I R 1926 Cal 752 (751, 755) : 93 Ind Cas 101, *Ramanuj Rai v. Dakshinewar Rai*.

(1936) A I R 1936 Mad 303 (309) : 161 Ind Cas 999, *Veetil Kelu v. Chellara Chappan*.

(1937) A I R 1937 Mad 451 (453) : 172 Ind Cas 47, *Moothachettiam Veetil Kelu v. Chellara Chappan*.

(1904) 23 Bom 87 (91) : 5 Bom L R 674, *Purazlam v. Sagaji*.

(1905) 13 Bom 216 (236), *Ala v. Dhondubai*.

8. (1937) A I R 1937 Mad 451 (453) : 172 Ind Cas 47, *Moothachettiam Veetil Kelu v. Chellara Chappan*.

9. (1904) 23 Bom 87 (91) : 5 Bom L R 674, *Purazlam v. Sagaji*.

that this view is open to doubt inasmuch as possession, in order to be adverse, must be *actual*.

Arts. 142 & 144
Notes 85-86

Where a stranger gets into possession of the mortgaged property through a usufructuary mortgagee who is in possession of the property and in collusion with such mortgagee, it has been held that the possession of such stranger is not adverse to the mortgagor.¹⁰ The reason given is that such stranger is bound by the same estoppel as the mortgagee through whom he gets possession and cannot deny the mortgagor's title.

See also the undermentioned cases ¹¹

86. Adverse possession against tenant, if adverse against landlord. — A landlord is not entitled to possession of property let out to a tenant, so long as the tenancy continues¹ and hence, during the currency of the lease, the landlord cannot sue for possession of the property.² It follows from this that where during the continuance of a lease the tenant is dispossessed by a third party who enters into possession of the property, the possession of such third party cannot be adverse to the landlord so long as the lease

10. (1937) A I R 1937 Mad 451 (454) 172 Ind Cas 47, *Moolhachettiam Veetil Kelu v Chekkara Chappan*

11. (1896) 23 Cal 483 (492) 23 Ind App 8 6 Mad L Jour 43 6 Sar 669 (P C), *Imdad Hussain v Aziz-un-nissa*. (Usufructuary mortgage by A to B

C is entitled to a certain underproprietary rights in the land—C's possession is adverse to the whole world including A from the date of the decree)

(1916) A I R 1916 Mad 911 (912) 81 Ind Cas 630, *Chinnappa Theian v B...* (Tenant accepted to usufructuary mortgage—tenants title of the

(1870) 2 N W P H C R 199 (199, 200), *Ajoodhya Singh v Girdharee*. (Mortgagor redeeming possessory mortgage—Mortgagor's right against grantee from mortgagee arises on redemption of mortgage)

Note 86

1. (1926) A I R 1926 Mad 18 (20) 92 Ind Cas 20, *Veeraswami Mudali v Venkatachala*.

(1895) 19 Bom 139 (139), *Vinayak Janardan v Mamas*

2 (1909) 4 Ind Cas 30 (31) (Mad), *Krishnan Nambudri v Secy of State*

(1926) A I R 1926 Mad 18 (18, 19) 92 Ind Cas 20, *Veeraswami Mudali v Venkatachala Mudali*

(1898) 21 Mad 288 (290) 8 Mad L Jour 121, *Ramachand Chetty v Lakshmi Sertar*

(1896) 18 All 440 (448, 449) 1896 All W N 162 (F B), *Sri Ram v Laxmi Lal*

(1924) A I R 1924 Cal 900 (902) 781 Ind Cas 407, *Imdad Hussain v Laxmi Charan*

(1909) 2 Ind Cas 209 (210) 31 All 271 (271), *Hussain v Uddin*

Arts. 142 & 144
Note 86

continues.³ The reason is that possession cannot be adverse to any one who has no present right of possession. Hence, a suit by the landlord for possession against the trespasser will not be barred by limitation if it is brought within twelve years of the termination of the lease, although more than twelve years may have elapsed from the time when the trespasser first entered into possession.⁴ In *Kathyayani v. Uday Kumar*,⁵ the Privy Council observed as follows:

(1917) A I R 1917 Mad 760 (761) : 89 Mad 1042 : 32 Ind Cas 198, *Tiruvengada Konan v. Veankatchala Konan*. (Held, that though lessor cannot maintain a suit for possession, he can get a declaratory decree declaring his title.)

[But see (1922) A I R 1922 Nag 216 (217) : 18 Nag L R 82 : 64 Ind Cas 902, *Alibhai v. Shamrao*.]

3. (1914) A I R 1914 Bom 296 (297) : 38 Bom 53 : 21 Ind Cas 763, *Krishnadixit v. Baladixit*.

(1918) A I R 1918 Cal 584 (585) : 40 Ind Cas 271, *Hajra v. Kunja*.

(1919) A I R 1919 Cal 586 (587) : 41 Ind Cas 378, *Ishan Chandra v. Nishi Chandra*.

(1921) A I R 1921 Lah 17 (18) : 63 Ind Cas 717, *Gardhar Lal v. Mt. Umdajan*. (Following 4 Cal 327.)

(1921) A I R 1921 Bom 39 (39) : 45 Bom 1001 : 61 Ind Cas 594, *Vishnu Bhikaji v. Babla Lacksa*.

(1895) 19 Bom 133 (139), *Vinayak Janardan v. Mainai*.

(1931) A I R 1931 Pat 89 (90) : 9 Pat 877 : 129 Ind Cas 678, *Ganpat Lal v. Wazira Singh*.

(1930) A I R 1930 Pat 476 (477) : 126 Ind Cas 858, *Bankey Behari Lal v. Gudo Choudhury*.

(1924) A I R 1924 Cal 600 (609) : 79 Ind Cas 520, *Dusjendra Narain Roy v. Jogeschandra De*.

(1922) A I R 1922 Cal 87 (92) : 49 Cal 948 : 69 Ind Cas 126, *Uday Kumar Dass v. Katyani Debi*.

(1938) A I R 1938 Pat 220 (222) : 175 Ind Cas 202, *Gopi Ram Ram Chandra v. Nilas Lal Dutt*.

(1905) 2 Cal L Jour 87 (94) : 9 Cal W N 795, *Harek Chand Babu v. Bijoy Patni* sub-
haser against

"d.

"Deb Rai.

"Narain Roy.
under Sircar

(1882) 9 Cal L R 347 (318), *ProsonnomoynDas v. Kalidas Roy*.

(1867) 8 Suth W R 444 (445), *Ray Narain Roy v. Woomesh Chunder*.]

4. (1907) 29 All 593 (595, 596) : 1907 All W N 185 : 4 All L Jour 726, *Thamman Pande v. Maharajah of Vinnagaram*.

(1886) 13 Cal 101 (103), *Sharat Sundari Dabia v. Bhoob Pershad Khan*.

(1881) 10 Cal 577 (580), *Sheo Sohye Roy v. Luchmeshur Singh*.

(1882) 9 Cal 367 (369) : 12 Cal L R 19, *Krishna Gobind Dhur v. Hari Churn Dhur*.

(1868) 10 Suth W R 15 (19), *Womesh Chunder Goopto v. Raj Narain Roy*.

(1926) A I R 1926 Mad 849 (850) : 92 Ind Cas 245, *Manavikrama Zamorin Raja of Calicut v. Ventagiri Pattar*.

(1923) A I R 1923 Oudh 307 (309) : 27 Oudh Cas 301 : 81 Ind Cas 237, *Mahabir Prasad v. Ram Kumar*. (Sale of groves—Subsequent relinquishment to landlord by vendor—Landlord's suit against vendee—Art. 144 applies—Time runs from relinquishment.)

(1625) 19 Bom 123 (139), *Vinayak Janardan v. Mainai*.

5. (1925) A I R 1925 P C 97 (94) : 52 Ind App 160 : 52 Cal 417 : 88 Ind Cas 110 (P C.)

"It was argued that the lessor had a title to eject the trespasser and that if he did not do so, the trespasser obtained a title by limitation against him as well as against the tenant and that as the latter is now deprived of the possession of the lands, she is entitled, in a question with the landlord, to an abatement of rent. There is a long and consistent body of authority to the opposite effect in India, and although the matter has not been made the subject of direct decision by this Board, their Lordships see no ground for doubting the soundness of the decisions referred to in the judgment of the High Court.

"The duty of a tenant under a perpetual tenure such as the one in question is to protect himself against illegal encroachments by others on the lands of which he has the exclusive possession. If he fails to do so, he cannot prejudice the landlord's claim for rent. The considerations which appear to their Lordships to be conclusive are those stated by Peacock, C. J., in *Womesh Chunder Goopta v. Raj Narain Roy*⁶ and connected appeal, and which are quoted in the judgment of the High Court. It has also been pointed out in other judgments that the landlord cannot in the ordinary case know whether the possession of a particular area of land is adverse to the tenant or has taken place with his consent. He could not therefore safely sue an action at his own hand for ejectment of a trespasser, as he might always be met with the objection that the apparent trespass was acquiesced in by the tenant who can deal with the lands as he pleases."

Although, thus, the landlord's interest will not be affected by adverse possession against the tenant, the latter's interest can be acquired by adverse possession by a third party^{6a}. Where the tenant's interest has thus been acquired by adverse possession for the statutory period by a third party, the landlord in whose favour the tenant relinquishes his rights cannot recover possession from the trespasser. The reason is that in such a case the landlord merely sues as the transferee of the rights of the tenant and if the tenant is barred, the landlord also must be held to be barred⁷.

Where the landlord's right to receive rent from the tenant is interfered with and a third party collects such rents from the tenant

6. (1868) 10 Suth W R 15 (19), *Womesh Chunder v. Raj Narain*.

6a (1921) A I R 1921 Bom 33 (40) 61 Ind Cas 594 45 Bom 1001, *Fulhu Bhatia v. Dabla Lacha*.

(1895) 19 Bom 133 (139), *Venayak Janardan v. Mainas*.

(1933) A I R 1933 Pat 269 (270) 145 Ind Cas 613, *Ramdeyal Mahanti v. Pitam Bouri*.

6b (1933) 145 Ind Cas 60, *Dijoy Chand Mohanta v.*

Math Shaha v. Surja Kanta Lekhi.

307 (20-1) 27 Suth Cas 301 : 84

145 Ind Cas 613, *Ram Kumar (Landlord) v. own right and not as transferee of*

Arts. 142 & 144 in assertion of his own right, the *landlord's* interest must be held
Note 86 to be in the adverse possession of the third party and the latter
 can acquire the landlord's interest by such adverse possession for the
 statutory period.⁸

Where a tenant is in possession under a void lease and is dis-
 possessed by a third person, the possession of such third person will
 be adverse to the landlord from the moment of his entry into
 possession. The reason is that in such a case the landlord is entitled
 to possession notwithstanding the lease, as the lease is void.⁹

Where the term of a lease has expired and the tenant is holding
 over with the landlord's consent and a trespasser dispossesses the
 tenant, the trespasser's possession will be adverse to the landlord.
 The reason is that the landlord is entitled to put an end to the
 tenancy immediately and sue for possession against the trespasser.¹⁰

Where at the commencement of a lease the land is already in
 the possession of a trespasser, limitation is not saved by the granting
 of the lease and the landlord is not entitled to a fresh period of
 limitation from the termination of the lease.¹¹ The reason is that
 when once limitation has commenced to run, no subsequent disability
 or inability to sue can stop it.

In some decisions,¹² it has been held that even during the
 currency of a lease the landlord can sue for ejectment of a trespasser,
for the purpose of putting the lessee in possession. Even assuming
 that this view is correct, it will be seen that the person entitled to
 possession during the continuance of the lease is only the *lessee* and
 hence the possession of the trespasser can only be adverse to him
 and not to the landlord.

8. (1919) A I R 1919 Bom 45 (50) : 52 Ind Cas 770, *Yamunabai v. Lagmanna*.
 (1879) 3 Cal L R 576 (578), *Parbutti Dasi v. Ram Chand*.

(1922) A I R 1922 Cal 87 (92) : 49 Cal 948 : 69 Ind Cas 126, *Uday Kumar Das v. Katyan Debti*.

(1898) 1898 Bom P J 353, *Mahadev Vithal v. Vishunbhat Shivrambhat*.

(1897) 1 Cal W N 246 (247), *Gossain Mahendra Gir v. Rajani Kant Doss*.

[But see (1909) 3 Ind Cas 122 (123) : 4 Mad L Tim 327 (329), *Acharath Bappan v. Mathammal*.]

9. (1937) A I R 1937 Rang 180 (182) : 171 Ind Cas 648, *Dashir Ahmad v. Maatschappij*.

10. (1905) 10 Cal W N 843 (844), *Kishorearnath Sahai v. Kali Shankar Sahai*.

11. (1915) A I R 1915 Cal 675 (677) : 26 Ind Cas 436, *Kalukananda Mukherjee v. Bipradas Pal*.

12. (1925) 112 Ind Cas 314 (315) (Pat), *Dasoo Mahton v. Bhagwan Das*.

(1923) A I R 1923 Cal 192 (193) : 70 Ind Cas 792, *Rajecumar Mandal v. Ali Mia*.

(1915) A I R 1915 Mad 932 (934) : 30 Ind Cas 425, *Kathiri Muttie v. Kuttli Chekkutti*.

(1921) A I R 1921 Mad 42 (46) : 41 Mad 937 : 62 Ind Cas 231, *Mohideen Bowther v. Jayarama Aiyar*.

(1915) A I R 1915 Mad 359 (359) : 26 Ind Cas 347, *Soumaramma v. Vellaya Sethurangam*.

[See also (1925) A I R 1925 Pat 396 (397) : 113 Ind Cas 585, *Kuldip Vahto v. Md Hashim*.]

¹As to effect of abandonment by tenant, see Note 10 to Article 139, **Arts. 142 & 144**
ante. **Notes 86-87**

87. Onus of proof. — It has been seen in Note 15 *ante* that possession is presumptive evidence of a seisin in fee until the contrary is shown. It is therefore necessary, in every suit for possession, that the plaintiff should prove a *better title* than that of the defendant. He must succeed on the strength of his own title and not on the weakness of the defendant's case.¹ Proof of *proprietary* title on the

Note 57

1. (1875) - *Series*.
to have
of supe-

alleged by the defendants, but upon proof of that title which it is necessary for plaintiff to establish in order to disturb the possession of the defendants.)

- (1872) 18 Suth W R 91 (94, 99) . 2 Suther 619 4 Sar 788 (P C), *Wise v. Bro-
jendra Coomar Roy*.
(1876) 4 Cal 727 (732) : 6 Ind App 76 : 3 Sar 865 . R and J 54 3 Ind Jur
222 (P C), *Mirzan Jehan Kadar v. Afsur Bahu*.
(1928) A I R 1928 P C 130 (135) . 109 Ind Cas 392 (P C), *Jaigobind Pan-
dey v. Ramnandan Sahai*.
(1928) 13 B 1927 P C 60 (65) : 157 Ind Cas 220 . 16 Pat 369 . 81 Sind L R
7 Ind Cas 518
out title suits

- (1903) 5 Bom L R 225 (227), *Rajaram Tuljaram v Nanchand Tuljaram*.
 (1870) 7 Bom H C R A C 82 (86, 87), *Dadabhai v Sub Collector of Broach*.
 (1914) A I R 1914 Bom 152 (153) 38 Bom 240 : 23 Ind Cas 786, *Sitaram Bhimaji v. Sadhu Auaji*.
 (1877) 3 Cal 796 (800) 1 Cal L R 259 3 Suther 486 : 3 Sar 776 : 2 Ind Jur 147 (P C), *Radha Prosad Singh v. Ram Coomar Singh*.
 (1882) 11 Cal L R 395 (397), *Doyanidhi Panda v Kelas Panda*.
 (1893) 21 Cal 244 (247), *Lep Singh Khasia v Nimar Khasia*.
 (1924) A I R 1924 Cal 555 (560) 60 Ind Cas 357, *Lakshman Chandra v Takim Dhali*.
 (1925) A I R 1925 Cal 140 (142) 64 Ind Cas 91 51 Cal 953, *Administrator General of Bengal v Bal Kissen Misser*.
 (1925) A I R 1925 Cal 343 (344) 108 Ind Cas 43, *Lala Singh v. Chandra Badansingh*.
 (1914) A I R 1914 Lsh 32 (32) 26 Ind Cas 341, *Amar Singh v Dhola*.
 (1908) 1908 Pan W R No 63 (p 241), *Badar Din v Kale Khar*.
 (1936) A I R 1936 Mad 191 (192) 162 Ind Cas 37, *Kadambari Dewas om Uralan v Secretary of State*.
 (1916) A I R 1916 Pat 189 (140) 37 Ind Cas 924, *Ghasita Singh v Mt Bhagmani Keer*.
 (1923) A I R 1923 Pat 72 (74) 2 Pat 75 68 Ind Cas 601 *Abdur Rahman v Sheikh Wali Mohamad*.
 (1934) A I R 1934 Pat 64 (65) 150 Ind Cas 336 *Eastman Mondar v Eastman Adhin Ray*.
 (1926) A I R 1926 Sind 92 (92) 97 Ind Cas 245, *Munshi v Vassani*.

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part of the plaintiff would, of course, be a better title than that of the defendant who is merely in possession of the property. As has been seen in Note 4, a *prior possession* is itself proof of a better title as against a subsequent possessor without title.

But the mere fact that the plaintiff, in a suit for possession, shows a better title, proprietary or possessory, than that of the defendant, is not necessarily sufficient to entitle him to a decree for possession against the defendant. He has further to prove that such title is a *subsisting one*, that is, that such title has not been extinguished by lapse of time.² For, it is a fundamental principle that it is the obligation of the plaintiff in every case to show that his action or suit is not barred by limitation.³

The above principles are applicable equally to cases falling under Article 142 or under Article 144. To deal first with cases falling under Article 142, that is cases where the plaintiff, while in possession, has been dispossessed or has discontinued possession, and he sues for possession, the *onus* in such cases will, according to the principles stated above, be on the plaintiff to show —

1. that he has a *title* to possession, whether a possessory or a proprietary one, which is superior to that of the defendant, and
2. that his dispossession or discontinuance of possession, as the case may be, was within twelve years of the suit, or in other

(See also (1919) A I R 1919 P C 62 (68) : 43 Mad 253 : 46 Ind App 201 : 53 Ind Cas 288 (P C), *Arunachalam Chetty v. Venkata-chalapathy*.)

(1929) A I R 1929 Nag 318 (319) : 119 Ind Cas 701, *Kasturchand Bhikamchand Shop v. Atmaram*.]

2. (1920) A I R 1920 Pat 256 (257) : 57 Ind Cas 151, *Rammanohar v. Methila Prasad Sahai*.

"Yashug Ali.
 567, *Mashar*

(1903) 5 Bom L R 186 (190), *Yamunabai v. Dhondi*.

(1884) 10 Cal 577 (579, 580), *Sheo Sohye Roy v. Luckmeshur Singh*.

(1871) 15 Suth W R 178 (179), *Hurro Chunder Choudhury v. Gobind Chunder Moitra*.

(1875) 1 Cal L R 531 (533), *Mahendra Nath Mukherjee v. Nafur Chunder Pal*. (Court auction purchase—Possession taken under, is adverse if purchase is void—Suit by owner after 12 years against transferee of purchaser is barred.)

(1918) A I R 1918 Cal 953 (954) : 42 Ind Cas 709, *Dokarijoddar v. Nilmani Kundu*.

(1922) A I R 1922 Lah 432 (433) : 69 Ind Cas 171, *Duni v. Maleri Ram*.

(1920) A I R 1920 Nag 9 (11) : 54 Ind Cas 131, *Lkoji Kunbi v. Ahaji Kunbi*.

(1917) A I R 1917 Oudh 330 (310) : 37 Ind Cas 715 : 19 Oudh Cas 374, *Hearsey v. Karam Singh*.

(1910) 8 Ind Cas 1123 (1123) : 6 Nag L R 160, *Baliram v. Sitia*.

(1912) 17 Ind Cas 518 (519) (All), *Mt. Sundar v. Saraswati*.

3. See Note 23 to Section 3 ante.

: 93 Ind Cas 250

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 n v. *Maharajah*

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words, that he was in actual or in constructive possession within twelve years of the suit.⁴ It is not however necessary

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(1886) 11 Bom 216 (219) : 1886 Bom P J 325, *Ramchandra Narayan v. Narayan Mahadev*. (Case under Article 127.)

(1869) 6 Bom H C R App Cas 125 (128), *Pandurang Govind v. Balkrishna Hari*.

(1878) 5 Cal 36 (37, 39), *Mahomed Ibrahim v. Morrison*.

(1868) 9 Suther W R 131 (132), *Nobokishore Dey v. Ramkishen Mohurir*.

But he is not bound to show that he had sufficient cause for not filing the suit earlier; see.—

(1930) A I R 1930 All 193 (197) : 52 All 501 : 124 Ind Cas 510 (F B), *Mt. Ananti v. Chhannu*.

4. (1889) 11 All 438 (446) : 1889 All W N 155, *Parmanand Musr v. Sahib Ali*

(1892) 14 All 193 (194) : 1892 All W N 55, *Jafar Husam v. Mashug Ali*.

(1906) 28 All 479 (480) : 3 All L Jour 331 : 1906 All W N 95, *Deba v. Roh-tag, Mal*.

(1906) 28 All 760 (761) . 3 All L Jour 567. 1906 All W N 234, *Mazhar Singh v. Behari Singh*.

(1905) 2 All L Jour 62 (63, 64) . 1905 All W N 14, *Musafir Roy v. Mt. Lagan Barta Kuar*.

(1915) A I R 1915 All 106 (107) . 28 Ind Cas 552, *Anand Sarup v. Asad Ali*.

(1916) A I R 1916 All 181 (182) . 86 Ind Cas 427, *Sheopujan v. Sohbat Tewari*.

(1917) A I R 1917 All 42 (42) : 40 Ind Cas 420, *Champa Lal v. Mangal Chand*.

(1923) A I R 1923 All 418 (419) : 71 Ind Cas 1033, *Jharap Rai v. Jaint Rai*.

(1923) A I R 1923 All 419 (420) : 73 Ind Cas 212, *Tariff v. Asa Ram*.

(1924) A I R 1924 All 920 (920) . 79 Ind Cas 951, *Basu v. Mt. Nanh*.

(1926) A I R 1926 All 82 (83) . 89 Ind Cas 466, *Komil Prasad v. Bharat Indu*.

(1928) A I R 1928 All 412 (413) . 50 All 813 . 115 Ind Cas 791, *Sita Ram v. Ram Sunder*.

(1933) A I R 1933 All 775 (776) . 55 All 209 . 143 Ind Cas 497, *Kallan v. Mohammad Nabi Khan*.

(1934) A I R 1934 All 993 (995, 997) . 57 All 278. 152 Ind Cas 1 (F B), *Dhindhya Chai Chand v. Ram Gharib*.

(1935) A I R 1935 All 774 (775) . 155 Ind Cas 821, *Baboo Singh v. Ram Manohar*.

(1882) 6 Bom 503 (511), *Muro Desai v. Ramchandra Desai*.

(1892) 16 Bom 343 (346), *Kashinath Sitaram v. Shrudhar Mahadev* (A dispossessed—Selling property to B—Suit by B against C in possession—B must prove A's possession within 12 years)

(1900) 25 Bom 287 (303) . 2 Bom L R 1111, *Hanmantrav v. Secretary of State*.

(1903) 27 Bom 43 (65) . 4 Bom L R 721, *Tarubai v. Venkat Rao*.

(1869) 6 Bom H C R A C 125 (128), *Pandurang Govind v. Balkrishna Hari*.

(1900) 2 Bom L R 407 (409), *Sitaram Raghunath v. Naro Gound*.

(1902) 4 Bom L R 801, *Maruti v. Banu Bai*.

(1903) 5 Bom L R 225 (223, 229), *Rajaram v. Nanachand*.

(1906) 8 Bom L R 96 (93), *Hari v. Dhondi*.

(1903) 10 Bom L R 571 (573), *Bhagwan Singh v. Secretary of State*.

(1877) 1877 Bom P J 114 (114), *Vittoba v. Shankar*.

(1890) 1890 Bom P J 175, *Zusia Francis v. Manoel Gustin Fernan*.

(1915) A I R 1915 Bom 92 (93) . 33 Bom 335 . 23 Ind Cas 21, *Subappa Shan-larappa v. Venkappa Golappa*

(1923) A I R 1923 Bom 361 (361) . 77 Ind Cas 506, *Kasturath Gyanaba v. Ganesh Sitaram*

(1923) A I R 1923 Bom 364 (365) . 77 Ind Cas 470, *Pandurang Mahadeo v. Basappa Siddappa*.

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- (1936) A I R 1936 Bom 201 (208, 209, 218) : 163 Ind Cas 632, *Govindbhai v. Dabhyabhai*.
 (1893) 9 Cal 125 (127), *Bhoonthnath Chatterjee v. Kedarnath Banerjee*.
 (1894) 10 Cal 374 (377, 378), *Gopaul Chunder Chuckerbutty v. Nilmoney Mitter*.
 (1897) 14 Cal 610 (614) : 12 Ind Jur 61, *Tulshi Pershad v. Raja Misser*.
 (1908) 7 Cal L Jour 414 (421) : 12 Cal W N 273 . 3 Mad L Tim 212, *Mirza Shamsheer Bahadur v. Kunj Behari Lall*.
 (1925) 41 Cal L Jour 72 (79), *Sarat Sundary Deby v. J. W. Lawdie*.

- (1894) 3 Cal W N 763 (766), *Rajendro Kumar v. Mohim Chandra*.
 (1903) 7 Cal W N 294 (296), *Keamuddi v. Hara Mohan Mondul*.
 (1926) 31 Cal W N 60 (64), *Lakhan Chandra Malo v. Gopal Sheikh*.
 (1864) 1864 Suth W R 107 (107), *Ishun Chunder Biswas v. Bissumbhur Biswas*.
 (1864) 1 Suth W R 67 (67), *Kedarnath Mookerjee v. Mohesh Chunder Paul*.
 (1865) 2 Suth W R 88 (89), *Mirza Mohamed Hossain v. Surahutoonissa Khanum*.
 (1865) 2 Suth W R 153 (153), *Kedarnath Acharjee v. Dhugwan Chunder Nandee*.
 (1865) 2 Suth W R 246 (247), *Gurcoodoss Roy v. Huronath Roy*.
 (1866) 6 Suth W R 110 (111), *Gobind Chunder Shaha v. Kishen Chunder Shaha*.
 (1866) 6 Suth W R 327 (328), *Jugodumba Chowdhraim v. Ram Chunder Deo Bakshee*.
 (1867) 7 Suth W R 34 (34), *Shanto Monee Gooplah v. Suttoabhamma Gooplah*.
 (1867) 7 Suth W R 212 (213), *Boolee Singh v. Hurobuns Narain Singh*.
 (1867) 7 Suth W
 (1867) 8 Suth W
 (1867) 8 Suth W
 (1868) 9 Suth W R 155 (156), *Dinobundhoo Suhaye v. James Furlong*.
 (1868) 9 Suth W R 251 (252), *Bhiloo Mundul v. Motee Lall Ghose*.
 (1868) 10 Suth W R 239 (239), *Kedarnath Mahatah v. Kadumbinee Debba*.
 (1869) 11 Suth W R 239 (239), *Doydonath Surmah v. Ojan Bibee*. (The plaintiff must prove date of dispossession as accurately as he can).
 (1869) 11 Suth W R 283 (284), *Ram Lochun Chowdhry v. Joy Doorga Dossia*.
 (1870) 13 Suth W R 23 (23) (P C), *Deer Chunder Jobraj v. Deputy Collector of Bhulloah*.
 (1870) 14 Suth W R 51 (51), *Hurro Narain Singh v. Bohlunt Narain Singh*.
 (1870) 14 Suth W R 135 (135, 136), *Busseroonissa Chowdrain v. Leelanund Singh*.
 (1871) 15 Suth W R 43 (43), *Ameer Ali v. Indurjeet Koer*.
 (1871) 15 Suth W R 178 (179), *Hurro Chunder Chowdhry v. Gobind Chunder Mostro* (Proof of dispossession on a particular date is not necessary—Possession within 12 years of the suit must be proved by plaintiff).
 (1872) 19 Suth W R 114 (118) (P C), *Grija Kant Lahory v. Hurriah Chunder*.
 (1873) 19 Suth W R 192 (194) : 12 Beng L R 219, *Gossaindass Koondoo v. Siroo Keomaree Debia*.
 (1873) 21 Suth W R 79 (79, 60), *Kalee Narain Bose v. Anund Moyee Goopla*.
 (1874) 21 Suth W R 282 (282, 283), *Ahmed Ali v. Hares Chund*.
 (1875) ..

- (1875) 24 Suth W R 273 (273), *Lu'che Khan v. W. Foley*.

- (1875) 24 Suth W R 315 (315, 316), *Mahomed Kabeer v. Abdool Ascen*.
 (1875) 24 Suth W R 389 (390), *Shaiikh Ghogoollee v. Shaiikh Muzkur Hossein*.
 (1875) 24 Suth W R 417 (418), *Khoda Newaz Chowdhury v. Brojendro Coomar*.
 (1914) A I R 1914 Cal 703 (704) 16 Ind Cas 741, *Nabaduripendra Mookerjee v. Madhu Sudan Mandal*.
 (1916) A I R 1916 Cal 99 (99) 35 Ind Cas 72, *Tomejudd v. Mula Chowkidar*.
 (1917) A I R 1917 Cal 79 (80) 39 Ind Cas 356, *Barakat Ali v. Bassant Numa*.
 (1918) A I R 1918 Cal 32 (34) 51 Ind Cas 70, *Khedon Lal v. Rajendra Naram Singh*.
 (1918) A I R 1918 Cal 414 (414) 41 Ind Cas 690, *Oli Sha v. Farid Sardar*.
 (1919) A I R 1919 Cal 672 (673) 45 Ind Cas 408, *Manindra Chandra v. Sarabindu Ray*.
 (1919) A I R 1919 Cal 674 (676) 46 Cal 103 : 45 Ind Cas 864, *Sachi Prasad v. Amar Nath Rai*.
 (1922) A I R 1922 Cal 557 (565) : 67 Ind Cas 673, *Rakhai Chandra v. Durga Das*.
 (1923) A I R 1923 Cal 286 (287) 66 Ind Cas 914, *Ram Ratan Mandal v. Nilmoni Chowdhury*.
 (1925) A I R 1925 Cal 140 (142) 51 Cal 953 84 Ind cas 91, *Administrator General of Bengal v. Balkissen Misser*.
 (1925) A I R 1925 Cal 1230 (1231) 88 Ind Cas 567, *Panchanon Sarkar v. Basanta Kumari Dasi*. (The rule is the same in all cases, and the differences are only in the manner in which plaintiff should prove his possession.)
 (1926) A I R 1926 Cal 115 (116) : 87 Ind Cas 694, *Rahimuddin Sarkar v. Umesh Chandra*.
 (1926) A I R 1926 Cal 1166 (1168) : 97 Ind Cas 1003, *Birendra Nath Ray v. Satis Chandra*.
 (1928) A I R 1928 Cal 118 (121) 105 Ind Cas 369, *Gopal Chandra Maity v. Sm. Monmohini Dasi*.
 (1928) A I R 1928 Cal 765 (767) 117 Ind Cas 606, *Hardutt Ray Chamarua & Co. v. Ugyr Shaiikh*.
 (1930) A I R 1930 Cal 673 (676) 128 Ind Cas 195, *Debendra Nath v. Naharmal Jalan*.
 (1932) A I R 1932 Cal 300 (301) : 59 Cal 344 : 137 Ind Cas 279, *Krishna Nanda v. Lokenath Mookerji*.
 (1935) A I R 1935 Cal 151 (153) : 154 Ind Cas 714, *Haji Nayebari Sarkar v. Lalit Mohan Roy*.
 (1938) A I R 1938 Cal 150 (150, 151) 174 Ind Cas 511, *Guru Charan Rudra Pal v. Mafizuddin Molla*.
 (1901) 39 Pun L R No. 59, *Bula Singh v. Albel Singh*.
 (1936) 39 Pun L R 365 (367), *Ladhoo Ram v. Bansu Dhar*.
 (1921) A I R 1921 Lah 202 (203) 69 Ind Cas 891, *Mahomed v. Ude Bhan*.
 (1927) A I R 1927 Lah 777 (778) : 100 Ind Cas 336, *Dullah v. Mt. Sardarani*.
 (1928) A I R 1928 Lah 32 (33) : 109 Ind Cas 320, *Rahella v. Wasira*.
 (1928) A I R 1928 Lah 98 (100) 8 Lah 635 : 109 Ind Cas 266, *Diam v. Khanu* (Actual date of dispossession need not be proved.)
 (1928) A I R 1928 Lah 704 (701) : 108 Ind Cas 874, *Daulat Ram v. Ballu*.
 (1928) A I R 1928 Lah 896 (897) : 115 Ind Cas 534, *Ghulam Muhammad v. v. Fateh Khan*.
 (1929) A I R 1929 Lah 92 (93) 109 Ind Cas 691, *Imam Din v. Man Singh*.
 (1933) A I R 1933 Lah 627 (628) : 143 Ind Cas 428, *Skeru v. Sham Singh*.
 (1934) A I R 1934 Lah 529 (530) : 148 Ind Cas 820, *Aya Singh v. Latif*.
 (1936) A I R 1936 Lah 203 (203) : 162 Ind Cas 330 : 17 Lah 449, *Sher Mahomed Shalbaz Khan v. Sher Mahomed Barre Khan*.
 (1916) A I R 1916 Mad 734 (738) : 29 Ind Cas 10, *Kalagarumal Keerudayan v. Chidambaram Thirujarat*.

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- (1919) A I R 1919 Mad 31 (31) : 52 Ind Cas 637, *Sankaralinga Mudaliar v. Kuthalinga Mudaliar*.
- (1922) A I R 1922 Mad 59 (60) : 45 Mad 370 : 67 Ind Cas 246, *Vennam Ramiah v. Kusru Kotamma*.
- (1926) A I R 1926 Mad 181 (182) : 91 Ind Cas 454, *Kuppasami Mudaliar v. Chokkalinga Mudaliar*.
- (1931) A I R 1931 Mad 282 (283) : 130 Ind Cas 815, *Sevugan Chetty v. Kannappa Chetty*.
- (1931) A I R 1931 Mad 644 (646) : 133 Ind Cas 9 : 54 Mad 622, *Ramanathan Chettiar v. Lakshmannan Chettiar*.
- (1936) A I R 1936 Mad 191 (192) : 162 Ind Cas 87, *Kadambeni Devswami Uralan v. Secretary of State*.
- (1918) A I R 1918 Nag 161 (161) : 48 Ind Cas 70, *Champat v. Lazmi Narayan*.
- (1923) A I R 1923 Nag 95 (96) : 69 Ind Cas 883, *Raghuraj v. Ballabhdas*.
- (1939) A I R 1939 Nag 7 (9), *Meherban Lalli Pinjara v. Yusuf Khan*.
- (1915) A I R 1915 Oudh 201 (205) : 18 Oudh Cas 43 : 28 Ind Cas 855, *Brijraj Singh v. Ganga Baksh*.
- (1917) A I R 1917 Oudh 20 (23) : 41 Ind Cas 80, *Ratipal v. Dipin Chandra*.
- (1925) A I R 1925 Oudh 42 (48) : 79 Ind Cas 964 : 27 Oudh Cas 130, *Gur Sahai Kandu v. Chhedi*.
- (1931) A I R 1931 Oudh 177 (229) : 136 Ind Cas 642, *Mahomed Anim Khan v. Mahomed Saadat Ali Khan*.
- (1934) A I R 1934 Oudh 21 (24) : 147 Ind Cas 805, *Mahomed Mahmud v. Mahomed Afag*.
- (1935) A I R 1935 Oudh 88 (89) : 10 Luck 513 : 153 Ind Cas 371, *Ram Shankar v. Sheo Dutt*.
- (1917) A I R 1917 Pat 528 (529) : 39 Ind Cas 777, *Baker Husain v. Ranjit Koer*.
- (1919) A I R 1919 Pat 207 (210) : 51 Ind Cas 801, *Bhikhad Bhunjan v. Upendra Nath*.
- (1920) A I R 1920 Pat 359 (360) : 56 Ind Cas 40, *Bhikhan Qassab v. Mardan Ali*.
- (1920) A I R 1920 Pat 598 (599) : 54 Ind Cas 960, *Kisun Prasad Singh v. Surat Narain Prasad*.
- (1921) A I R 1921 Pat 158 (159, 160) : 58 Ind Cas 774, *Inder Lal v. Ram Surat Kuer*.
- (1921) A I R 1921 Pat 277 (277) : 61 Ind Cas 78, *Bahadur Ali Khan v. Secretary of State*.
- (1922) A I R 1922 Pat 33 (34), *Nehari Ball v. Lakshmi Kantha Roy*.
- (1923) A I R 1923 Pat 96 (98) : 66 Ind Cas 471, *Balgebund Kumar v. Rai Behari Lal*.
- (1923) A I R 1923 Pat 558 (560) : 72 Ind Cas 648, *Chattrapat Pratab Bahadur Sahai v. C. G. Lees*.
- (1924) A I R 1924 Pat 341 (342) : 73 Ind Cas 41, *Gayami Sahu v. Balchand Sahu*.
- (1924) A I R 1924 Pat 629 (630) : 3 Pat 253 : 81 Ind Cas 669, *Ram Nath Sarangi v. Gobardhan Pandey*.
- (1926) A I R 1926 Pat 577 (579) : 97 Ind Cas 282, *Kesho Prasad Singh v. Kartarath*.
- (1929) A I R 1929 Pat 529 (529) : 122 Ind Cas 816, *Gopal Sahu v. Ghan-sham Das*.
- (1936) A I R 1936 Pat 147 (149, 150) : 161 Ind Cas 585, *Mohamad Yusuf v. Mohamad Wahced*.

to prove the *actual date* of dispossession, provided it is shown to have happened within twelve years of the suit.⁵ Arts. 142 & 144
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Proof of proprietary title in the plaintiff will not, by reference to the principle that possession follows title, shift the burden of proof on to the defendant to show that the plaintiff was not in possession

(1918) A I R 1918 Low Bur 131 (182) : 41 Ind Cas 722, *Appan Charan v. Kyause Ma*

(1920) A I R 1920 Low Bur 175 (175) : 56 Ind Cas 951, *Muthia Chetty v. Seena V. Thevar.*

(1925) A I R 1925 Rang 111 (111) : 1 Rang 492, 83 Ind Cas 182, *Ma Shan Ma v. Somasundaram Chetty.*

(1929) A I R 1929 Rang 153 (154) : 7 Rang 85 : 117 Ind Cas 591, *U Maung Gys v. Maung On Bwin.*

(1929) A I R 1929 S. 3 272 (1929) 200 : 27 S. 3 272 : 117 Ind Cas 777

Khan.

(1909) 2 Ind Cas 314 (315) (Mad), *Madhava Gowdu v. Lohanatha Patro.*

(1910) 6 Ind Cas 667 (667) (Mad), *Venkatarayudu v. Sankarayya.*

(1911) 10 Ind Cas 498 (500) (Mad), *Subramania Reddy v. Ramachandra Reddy.*

(1912) 14 Ind Cas 295 (297) (Mad), *Prakhateri Parkum v. Koram.*

(1912) 15 Ind Cas 10 (11, 12) (All), *Bhole Singh v. Bhagwant Singh.*

(1912) 15 Ind Cas 97 (97, 98, 99) (Mad), *Adinarayana Iyer v. Krishnan.*

(1912) 15 Ind Cas 190 (190) (Mad), *In re Rangachariar.*

(1912) 16 Ind Cas 741 (742) (Cal), *Nabadwipendra Mukerjee v. Madhusudan Mandal.*

(1913) 18 Ind Cas 17 (20) (P C), *Dharani Kanta Lahiri v. Gabar Ali Khan.*

(1913) 19 Ind Cas 222 (224) : 1913 Pun Re No. 19, *Paras Ram v. Nathu Mal.*

(1913) 21 Ind Cas 335 (336) (Low Bur), *Maung Tun U v. Mg. Myat Tha Zan.*

(1925) 89 Ind Cas 687 (687) (Oudh), *Main Mohammad v. Sharaf Shah.*

(1926) 93 Ind Cas 1006 (1007) (Lah), *Rawal Bahksh v. Dolu Mal.*

(1926) 94 Ind Cas 417 (417) (Lah), *Rahmat Ullah v. Nawab.*

(1926) 96 Ind Cas 551 (552) (Pat), *Kirat Singh v. Sheoratan Singh.*

(1926) 97 Ind Cas 267 (269) (Pat), *Ghura Rai v. Harshar Prasad Sinha*

(1926) 98 Ind Cas 912 (915) (F B) (Cal), *Lakhan Chandra Malo v. Gopal Sheikh.*

(1927) 98 Ind Cas 1061 (1062) (Oudh), *Sheo Dayal v. Zohra.*

(1923) 107 Ind Cas 779 (780) (Lah), *Nur Khan v. Faqir Abdullah.*

(1929) 115 Ind Cas 420 (421) (Lah), *Basala v. Piru Mal.*

(1931) 134 Ind Cas 475 (476) (Oudh), *Abdul Rahim v. Mohammad Nazir.*

(1933) 146 Ind Cas 448 (449) (Pat), *Guhri Ram Singh v. Adalat Mahato.*
(A I R 1921 Pat 237 (F B), Followed)

[See also (1904) 27 All 153 (154) 1904 All W N 199, *Ram Charan Rai v. Kauleshar Rai*

(1915) A I R 1915 Cal 586 (588) 30 Ind Cas 939, *Sobhan Dalish v. Birendra Kishore Bahadur*

(1930) A I R 1930 Pat 410 (411) 129 Ind Cas 543, *Rajrath Pandey v. Sham Shankar Dubey*

(1909) 2 Ind Cas 314 (315) (Mad), *Madhava Gowdu v. Lohanatha Patro*

Alabailsh Bhuyin v. Lir Dikram

Ind Cas 72 Ali Akbar v. Bahksh

(1937) Mad 147 115 Ind Cas 750

urea Rai Bahadur v. Coochada

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within twelve years of the suit. The reason, as has been seen in Note 15 *ante*, is that the presumption that possession follows title is only an *inference of fact* which a Court, in its discretion, may or may not draw according to the circumstances of the case. In *Maharajah Koowar Baboo Nitrasur Singh v. Baboo Nand Loll Singh*,⁶ which was a case arising under Bengal Regulation 3 of 1793, Lord Justice Turner, in delivering the judgment of the Board, observed as follows :

"The appellant is seeking to disturb the possession admitted to have existed for about eleven years, of defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it) on a dispossession within twelve years next before the commencement of the suit; and, therefore, that he, or some person through whom he claims, was in possession during that period. *No proof of anterior title, such as would be involved in the decision of the boundary question in his favour, can relieve him from this burden, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession.* The lands in question may have been part of Mouzah Gopaulpore, and as such may have been enjoyed by his ancestor, and yet he may have lost, by lapse of time, his right to recover them."

In *Rajah Sahib Perhlad Sein v. Maharajah Rajender Kishore Singh*,⁷ which was a case under the Act of 1859, their Lordships of the Privy Council did not think it necessary to go into the question of the title of the plaintiff, but held the suit to be barred on the ground that he failed to show his possession within twelve years of the suit. They observed as follows :

"The appellant comes into Court admitting upon the face of his plaint that he is out of possession, and has been so for more than ten years; and the date which he assigns to his dispossession is the 20th of March 1851. Upon the issue as settled by the Court, it lay upon him to establish that he was in possession up to that date; or, failing in that, that the date at which he or some former proprietor of Ramnuggur was last in possession is consistent with a right to institute this suit. Act No. VIII of 1859, Section 32, shows that the plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time."

In *Mohima Chunder Mozoomdar v. Mohes Chunder Neogi*,⁸ also, their Lordships of the Privy Council considered it unnecessary to go into the plaintiff's title though he had proved several documents in

6. (1860) 8 Moo Ind App 199 (221) : 1 Suth W R P C 51 : 1 Suther 420 : 1 Sar 744 : Ser 913n (P C).

7. (1869) 12 Moo Ind App 292 (337) : 12 Suth W R P C 6 : 2 Suther 225 : 2 Sar 430 : 2 Beng L R 111 (P C).

8. (1898) 16 Ind App 23 (26) : 16 Cal 473 : 5 Sar 321 (P C).

support of his title, and held that the plaintiff must prove his possession within twelve years of the suit. They observed: **Arts. 142 & 144 Note 87**

"The plaintiff must succeed by the strength of his own title and it is the opinion of their Lordships that in this case the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at sometime within twelve years before the commencement of the suit, namely, for the two or three years prior to the year 1875 or 1874, and that it does not lie upon the defendants to shew that in fact the plaintiffs were so dispossessed."

In *Dharani Kanta Lahiri Chowdhuri v. Gabar Ali Khan*,⁹ the Privy Council again reiterated the view that in a suit for ejectment "it lay upon the plaintiffs to prove *not only* a title against the defendants but to prove that the plaintiffs had been dispossessed or discontinued to be in possession of the lands within the twelve years immediately preceding the commencement." See also the undermentioned cases¹⁰ in which it has been held that mere proof of plaintiff's title in a suit falling under Article 142 is not enough to entitle him to succeed and will not shift the burden on to the defendant to show that the dispossession or discontinuance, as the case may be, took place more than twelve years before suit. A contrary view has, however, been held in some cases,¹¹ namely that proof of title in cases under Article 142 is sufficient, by reference to the presumption that

9. (1913) 18 Ind Cas 17 (20) (P C).

10. (1921) A I R 1921 Pat 237 (239) · 6 Pat L Jour 478 · 62 Ind Cas 1 (F B).
Sita Prasad Singh v Hira Singh. (Following 8 Moo Ind App 199)

(1867) 2 Agra 177 (178), *Tara Singh v. Chanda Mull*.

(1893) 1893 All W N 60 (61), *Ram Dial v. Lal Bahadur*.

(1914) A I R 1914 All 207 (207) · 23 Ind Cas 521, *Mt. Hulasoo v. Salamut-khan*.

(1900) 14 Pat 450 (450) Pat L Jour 111 · Pat L Jour 111.

Gaganendra Nath
Ali Khan Bahadur

(1922) A I R 1922 Cal 557 (566, 567) · 67 Ind Cas 673, *Rakhal Chandra Ghose v. Durgadas Samanta*.

(1923) A I R 1923 Cal 286 (287) · 66 Ind Cas 914, *Ram Ratan Mandul v. Nilmoni Chowdhury*.

(1938) A I R 1938 Cal 206 (208) · 175 Ind Cas 247, *Ramendra Prasad v. Baradaprasad Banu*.

(1917) A I R 1917 Lah 201 (204) · 39 I. C. 971, *Mool Chand v. Amar Nath*.

(1930) A I R 1930 Nag 7 (9) · 1938 Nag L Jour 418 (420) *Maherban Lalla Pimjara v. Yusufkhan*.

(1921) A I R 1921 Pat 234 (235) · 57 Ind Cas 744, *Gajadhar Prasad v. Mt. Dulhin Gulab Kuer*.

(1930) A I R 1930 Pat 184 (196) · 123 Ind Cas 612, *Badrinath Upadhyay v. Baijnath Mandal*.

(1936) A I R 1936 Rang 124 (125) · 161 Ind Cas 833, *Ma Prar Gai v. U Shue Kyun*.

(1928) 108 Ind Cas 732 (733) (Cal), *Sattar Duncan v. Samed Ali*.

11. (1924) A I R 1924 All 924 (925), *Shim Prasad Singh v. Muneshwar Dubey*.

(1934) A I R 1934 Bom 207 (209, 210) · 58 Bom 397 & 400 · 143 Ind Cas 552 & 553 (F B), *Krishnaji v. Madhusa*.

(1937) A I R 1937 Oudh 328 (329) · 168 Ind Cas 100 · 11 Luck 24, *Sree Moorat v. Chhangra*.

Arts. 142 & 144
Note 87

possession follows title, to shift the burden on to the defendant. It is submitted that these decisions cannot be accepted as laying down the correct law. The question whether the plaintiff has proved that he was in possession within limitation and has thus discharged the *onus* that lies on him, is one of fact, and in deciding the question the fact that the plaintiff has title will be a factor which will come to his aid with more or less force according to the circumstances of the case,¹² just as various other facts may lead to the inference that the plaintiff must have been in possession.¹³

- (1926) A I R 1926 Lah 13 (14) : 89 Ind Cas 995, *Ismail v. Ibrahim*.
 (1929) A I R 1929 Lah 669 (670) : 127 Ind Cas 11, *Bhalla Singh v. Jagat Singh*.
 (1933) A I R 1933 Lah 105 (106) : 141 Ind Cas 234, *Mt. Raushan Ara Begum v. Mahmud Beg*.
 (1933) A I R 1933 Lah 722 (723) : 146 Ind Cas 725, *Ganpat Rai v. Har Dial*. (Purporting to follow A I R 1916 P C 21.)
 (1934) A I R 1934 Lah 1019 (1020), *Bishambar Das v. Telu Ram*.
 (1917) A I R 1917 Pat 471 (472) : 41 Ind Cas 114, *Mysnapore Zamindary Co., Ltd v. Panday*.
 (1929) A I R 1929 Pat 529 (529) : 122 Ind Cas 816, *Gopal Sahu v. Ghan-shyam Das*. (Waste land.)

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the defendant must prove his adverse possession for more than

the defendant, who must prove more than 12 years' adverse possession.]

12. (1927) A I R 1927 Nag 37 (37, 38) : 97 Ind Cas 1006, *Tukaram Bajirao v. Tukaram Yeshwant*.
 (1914) A I R 1914 All 287 (287) : 26 Ind Cas 86, *Inayat Hussam v. Secretary of State*.
 (1922) A I R 1922 Bom 243 (244) : 66 Ind Cas 764 : 46 Bom 920, *Mahamad-sahab Ibrahim Sahab v. Tilokchand Abheerchand*.
 (1915) A I R 1915 Cal 834 (834) : 27 Ind Cas 802, *Sarojini Devi v. Kirtibash Das*.
 (1924) A I R 1924 Cal 855 (857) : 78 Ind Cas 679 : 51 Cal 669, *Suresh Chandra v. Shikha Kanta*. (In a suit for possession upon a possession it. For posses-
possession.)
 (1937) A I R 1937 Pat 422 (423) : 170 Ind Cas 385, *Chandra Mohan Singh v. Butu Man*.
 [See also (1925) A I R 1925 Bom 477 (478) : 89 Ind Cas 894, *Ula-wappa Basawanappa Hugar v. Gadigewa Hugar*. (The question was treated as one of evidence)]

13. See (1917) A I R 1917 Cal 79 (80) : 39 Ind Cas 356, *Barkat Ali v. Basant Nuntia*. (In an ejectment suit plaintiff should prove his possession within the statutory period but if plaintiff is mentioned in the Record of Rights as the person in possession, then the burden is shifted on to the defendant and he must prove that plaintiff had been out of possession for more than the statutory period.)

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Note 87

Where the plaintiff proves these two elements or they are admitted by the defendants, the presumption is that the character of the possession continued till within the period of limitation up to the date alleged by the plaintiff as the date when the possession of the defendant became adverse to him. The burden then shifts to the defendant to show that his possession became adverse more than twelve years before suit.¹⁷ Where therefore the plaintiff lays the foundation for the applicability of Article 144, the *onus* is on the defendant to prove that he has been in adverse possession for more than twelve years before suit.¹⁸ The *onus* will not be discharged by

- (1928) 111 Ind Cas 577 (582, 583) : 55 Mad L Jour 302 (P C), *Raja of Bobbili v. Ayyagari Sodemma*. (Where the defendant was admitted to have been in possession for a long time and the plaintiff alleged that such possession was given only by way of security for debt, it was held on failure to prove such giving, the plaintiff would fail.)
- (1902-03) 2 Upp Bur Rul Evidence 7, *Maung Tun v. Maung Pa U*.
 [See also (1902) 1902 Pun Re No. 30, *Din Muhammad v. Mehr Daksh.*]
17. (1913) 22 Ind Cas 65 (67) : 9 Nag L R 179, *Anjuman Islamia v. Hisamul*. (Once the defendant is proved to have been in permissive possession, it lies on him to prove that it became adverse subsequently.)
- (1927) A I R 1927 Nag 101 (106) : 22 Nag L R 176 : 100 Ind Cas 446, *M. Deshrani v. Kishore Singh*.
- (1922) A I R 1922 Oudh 231 (234), *Nageshar Sahai v. Shiam Bahadur*.
 (1893-1900) 1893-1900 Low Bur Rul 360 (361), *Ma Hla Bu v. Ma Te*.
- 18.

Arts. 142 & 144

Article 144

- (1919) A I R 1919 All 403 (404) : 41 All 669 : 52 Ind Cas 366, *Jai Chand v. Girwar Singh*.
- (1934) A I R 1934 All 993 (997) : 57 All 278 : 152 Ind Cas 1 (F B), *Bindhyachal Chand v. Bam Gharib*.
- (1879) 4 Bom 89 (93), *Sambhubhai Karsandas v. Shivajidas Sadashindas Desai*.

- (1887) 1887 Bom P J 242, *Ganga v. Nago*.
- (1923) A I R 1923 Bom 361 (361) : 77 Ind Cas 506, *Kashinath v. Ganesh*.
- (1936) 163 Ind Cas 697 (903) : 62 Cal L Jour 177 (192) : 63 Cal 800, *Surendra Kumar Roy v. Ahmed Nawab Choudhury*.
- (1879) 4 Cal L R 40 (41), *Ogra Kant Choudhree v. Mookesh Chunder Sickdar*.
- (1869) 12 Suth W R 250 (251), *Ramdhun Satra v. Nobin Chunder Chowdhry*.
- (1922) A I R 1922 Cal 176 (177) : 70 Ind Cas 602, *Jankinath v. Baikuntha Nath*.
- (1923) A I R 1923 Cal 82 (85) : 77 Ind Cas 564, *Jobeda Khatun v. Tulsi Charan Das*.

- (1867) 1867 Pun Re No. 97, *Kurm Newaz v. Kurreem Baksh*.
 (1883) 1883 Pun Re No. 122, *Bula Shah v. Sobha Singh*.
 (1927) A I R 1927 Lah 236 (236) : 100 Ind Cas 477, *Kanshi Ram v. Taja*.
 (1927) A I R 1927 Lah 619 (620) : 103 Ind Cas 475, *Ali Muhammad v. Barkat*.
 (1929) A I R 1929 Lah 540 (550) : 117 Ind Cas 803 : 11 Lah 29, *Jano v. Narsingh Das*.
 (1934) A I R 1934 Lah 576 (579) 151 Ind Cas 490, *Harnam Singh v. Rana Upenderchand* (Plaintiff conferred certain of his own lands to the defendant for temporary use. Later, plaintiff sought to resume the land given to the defendant when the defendants denied his title and claimed the land as being an owner of it)

Siraj-ud-din v.

- (1920) A I R 1920 Nag 274 (274) : 30 Nag L R 18 : 150 Ind Cas 679, *Mt. Jyoti v. Zabu*.
 (1925) A I R 1925 Oudh 42 (43) 27 Oudh Cas 180 : 79 Ind Cas 964, *Gur Sahai Kandu v. Cheddi*.
 (1931) A I R 1931 Oudh 177 (229) : 136 Ind Cas 642, *Mahomed Azim v. Mahomed Saadat Ali*.
 (1931) A I R 1931 Oudh 892 (384) : 134 Ind Cas 599, *Mt. Zahida Begam v. Mumtaz Ali*.
 (1925) A I R 1925 Pat 789 (740) 86 Ind Cas 771, *Rameshwar Singh Bahadur v. Rit Lal Singh*.
 (1926) A I R 1926 Pat 577 (579) 97 Ind Cas 282, *Kesho Prasad Singh v. Kartarath*.
 (1932) A I R 1932 Pat 145 (146) : 11 Pat 165 : 142 Ind Cas 246, *Ram Prasad v. Bindeshwar Prasad*.
 (1916) A I R 1916 Low Bur 77 (78) : 82 Ind Cas 568, *Ma Nyem Me v. Ma May*.
 (1920) A I R 1920 Low Bur 175 (176) : 56 Ind Cas 951, *Muthia Chetty v. Seena V Thevar*.
 (1928) A I R 1928 Rang 13 (14) 5 Rang 576 105 Ind Cas 598, *Maung Aung Tun v. Maung San Nyun*.
 (1928) A I R 1928 Rang 95 (95) : 104 Ind Cas 383, *Mg Than Gyang v. Ma Lun Daw*.
 (1931) A I R 1931 Rang 40 (45) 8 Rang 556 129 Ind Cas 511, *Maung Sin v. Maung So Min*.
 (1919) A I R 1919 Sind 98 (101) 53 Ind Cas 722 18 Sind L R 159, *Naravindas v. Buto*.
 (1913) 21 Ind Cas 335 (336) (Low Bur), *Maung Tun U v. Mg Myat Tha Zan*.
 (1931) 131 Ind Cas 461 (462) (All), *Mahomed Ishaq v. Zindi Begum*.
 (1923) A I R 1923 All 399 (400) 71 Ind Cas 265, *Lakhu v. Lal Singh*. (When defendant's possession is not or is presumed not to be adverse, he must show adverse possession for 12 years).
 (1917) A I R 1917 All 233 (234) 40 Ind Cas 97, *Shambhunath v. Hari Ram* (Possession of abadi land in agricultural mahal *prima facie* permissive.)
 [See also (1923) A I R 1923 All 565 (565) 74 Ind Cas 679, *Ragha Mal v. Abdus Sattar*.]
 (1903) 5 Bom L R 742 (744), *Dandacharya v. Shrinivacharya*.
 (1930) A I R 1930 Oudh 310 (311) 126 Ind Cas 703, *Yaqub Khan v. Sheo Dularey*.
 (1910) 6 Ind Cas 506 (506) (Mad), *Eranthilal Kunhimachia v. Theppil Pudua Vittal* (In a suit for possession, where defendant sets up adverse possession, it is not enough for the Court simply to find against defendant and for plaintiff—The Court should find the period for which the defendant was in possession and if for over the statutory period, whether the possession was only derivative—Without a definite conclusion on these points, no finding as to limitation should be recorded in plaintiff's favour.)

Arts. 142 & 144
Note 87

proof of possession of an *equivocal* character.^{18a} Thus, where the possession of a widow might have been adverse, but might also under the circumstances have been obtained under some arrangement with the owner, and the matter is not cleared up, the onus cannot be said to be discharged.^{18b}

Where the plaintiff sues for possession on the allegation that the defendant's possession was permissive or derivative at its inception but the defendant denies such allegation and the plaintiff fails to prove the permissive or derivative nature of the possession, the case would be one of dispossession and the Article applicable would be 142. The plaintiff must in such a case show that he was in possession within twelve years of the suit.¹⁹ The contrary view held in the undermentioned cases^{19a} is, it is submitted, not correct. The said decisions are all based upon considerations which have been shown in Note 2 *ante* to be incorrect.

[But see (1932) A I R 1932 Lah 45 (46) : 134 Ind Cas 97, *Mehr Khan v. Sakhi Mahomed.*]

- 18a (1902) 26 Bom 617 (621) : 4 Bom L R 312, *Balkrishna v. Govind.*
(1938) A I R 1938 Mad 454 (455) : 178 Ind Cas 301, *Atchayya v. Jalaluddin Sahib.*
- 18b (1902) 26 Bom 617 (621) : 4 Bom L R 312, *Balkrishna v. Govind.*
19. (1902) 24 All 90 (92) : 1901 All W N 188, *Haykhan v. Baldeo Das.*
(1911) 9 Ind Cas 812 (812) (All), *Brijlal Sahu v. Rameshar Sahu.*
(1938) A I R 1938 Mad 415 (419), *Alam Khan Sahib v. Karuppanaswami Nadan.*
(1938) A I R 1938 Lah 893 (894) 147 Ind Cas 285, *Hasan Mahomed v. Ahmed Bakhsh.*
(1915) A I R 1915 Bom 92 (93) : 39 Bom 335 : 28 Ind Cas 24, *Subbappa Shankerappa v. Venkappa Golappa.* (As soon as the part of the land is found to be in possession of the defendant, the case must necessarily fall under Art. 142—Every suit for possession in which the plaintiff alleges that he has had possession must fall under Article 142.)
(1925) A I R 1925 Nag 370 (370) : 87 Ind Cas 1023, *Singhuji v. Gambharji.* (Do.)
(1925) A I R 1925 Oudh 42 (43) : 27 Oudh Cas 130 : 79 Ind Cas 964, *Gur Sahaj Kandu v. Chedi.*
(1937) A I R 1937 All 124 (126) : 167 Ind Cas 371, *Ram Manohar v. Baboo Singh.*
(1920) 38 Mad L Jour 15 (15) (Critical Note on (1919) 41 All 669 : A I R 1919 All 403, *Jai Chand v. Gurwar Singh.*)
(1897-1901) 2 Upp Bur Rul 461 (463), *Maung Hman v. Maung Shwe Ka.* [See also (1906) 1906 Pun L R No. 73, *Behari v. Sadho Mal.*]
- 19a (1937) A I R 1937 Lah 32 (32) : 91 Ind Cas 1047, *Santa Singh v. Narain Singh.* (He can succeed merely on the strength of his title.)
(1925) A I R 1925 Mad 834 (835) : 87 Ind Cas 386, *Govinda Ramanuja v. Mahomed Esoof Sahib.* (Suit against alleged lessees—Lease denied and not proved—Suit also based on title—Art 144 applied)
(1932) A I R 1932 Oudh 46 (47) : 7 Luck 250 : 137 Ind Cas 678, *Suraj Bah v. Mahadeo Prasad.*
(1929) 117 Ind Cas 384 (384) (Lah), *Hiralal v. Lalji.*
(1927) A I R 1927 Mad 287 (287) : 99 Ind Cas 312, *Ramanauyachariar v. Sundarachariar.*
(1930) A I R 1930 Oudh 310 (311) : 126 Ind Cas 703, *Yakub Khan v. Shao Dularey.*
(1938) A I R 1938 Sind 198 (201) : 178 Ind Cas 690, *Arab Jhanglu v. Panjal Shah.*

A suit for a *declaration* of title is not one for possession of immovable property and the question of onus in such suits is strictly not relevant to a discussion of the question of onus in possessory suits. The decisions, however, dealing with the question of onus in declaratory suits are so often referred to in suits under Articles 142 and 144, that it may not be without advantage to refer to them.

Arts. 142 & 144
Note 87

Where a person sues for a declaration of his proprietary title to immovable property, and proves such title, it is for the defendant to show that the title has been lost by the plaintiff by his (defendant's) adverse possession of the property for the statutory period.²⁰ Where a person sues for a declaration of title to property *on the ground that he has acquired such title to it by adverse possession for the requisite period*, the onus is obviously on him to show his adverse possession for the statutory period.²¹ It is not for the defendant to show in such cases that the plaintiff was not in possession adversely to him for the requisite period. In *Secretary of State for India v. Chellikani Rama Rao*,²² a claim was preferred by an objector under the Madras Forest Act to certain property on the ground that he had, as against the Government, acquired title thereto by adverse possession for the requisite period. The claimant was in law in the same position as a person suing in the ordinary Courts of Justice for a declaration of right. It was contended that it was for the Government—defendant—who was *prima facie* the owner of the property (being the bed of a navigable river) to show that it had a subsisting title. Their Lordships of the Privy Council observed as follows:

"Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were correct, it would be open to the possessor for a year or a day to say, 'I am here, be your title to the property over so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions' "

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(1935) A I R 1935 Mad 754 (755) 156 Ind Cas 591, *Sulaiman Rowther v. Dawood Khan Sahib*.

(1939) A I R 1939 Nag 7 (9), *Maherbhan Lalli v. Yusuf Khan Kallu*.

20 (1917) A I R 1917 All 130 (131) 37 Ind Cas 794, *Mahomed Kamil v. Habibullah*.

21. (1930) A I R 1930 P C 281 (282) 11 Lah 633 57 Ind App 273 127 Ind Cas 537 (P C), *Jahandad Khan v. Abdul Ghafur*.

(1921) A I R 1921 Bom 177 (179) 45 Bom 789 61 Ind Cas 440 *Fazra Biliwant v. Secretary of State*.

(1929) A I R 1929 All 753 (759) 51 All 1042 119 Ind Cas 6, *Kankhaya Lai v. Girwar*.

(1937) 167 Ind Cas 801 (801) (Nag), *Ramaji Gujar v. Kankhaya Gujar*.

22. (1916) A I R 1916 P C 21 (26, 27) 33 Mad 617 43 Ind App 132 35 Ind Cas 902 (P C).

Arts. 142 & 144
Note 87

proof of possession of an *equivocal* character.^{18a} Thus, where the possession of a widow might have been adverse, but might also under the circumstances have been obtained under some arrangement with the owner, and the matter is not cleared up, the onus cannot be said to be discharged.^{18b}

Where the plaintiff sues for possession on the allegation that the defendant's possession was permissive or derivative at its inception but the defendant denies such allegation and the plaintiff fails to prove the permissive or derivative nature of the possession, the case would be one of dispossession and the Article applicable would be 142. The plaintiff must in such a case show that he was in possession within twelve years of the suit.¹⁹ The contrary view held in the undermentioned cases^{19a} is, it is submitted, not correct. The said decisions are all based upon considerations which have been shown in Note 2 *ante* to be incorrect.

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(1933) A I R 1933 Lah 893 (894) : 147 Ind Cas 285, *Hasan Mahomed v. Ahmed Balhsh*.
- (1915) A I R 1915 Bom 92 (93) : 39 Bom 335 : 28 Ind Cas 24, *Subbappa Shankerappa v. Venkappa Golappa*. (As soon as the part of the land is found to be in possession of the defendant, the case must necessarily fall under Art. 142—Every suit for possession in which the plaintiff alleges that he has had possession must fall under Article 142.)
- (1925) A I R 1925 Nag 370 (370) : 87 Ind Cas 1023, *Singhuji v. Gambhirji*. (Do.)
- (1925) A I R 1925 Oudh 42 (43) : 27 Oudh Cas 180 : 79 Ind Cas 964, *Gur Sahaj Kandu v. Chedi*.
- (1937) A I R 1937 All 124 (126) : 167 Ind Cas 371, *Ram Manohar v. Baboo Singh*.
- (1920) 38 Mad L Jour 15 (15) (Critical Note on (1919) 41 All 669 : A I R 1919 All 403, *Jas Chand v. Gurwar Singh*)
- (1897-1901) 2 Upp Bur Rul 461 (463), *Maung Hman v. Maung Shwe Ka*.
[See also (1906) 1906 Pun L R No 73, *Behari v. Sadho Mai*]
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- (1925) A I R 1925 Mad 834 (835) : 87 Ind Cas 386, *Govinda Ramanuja v. Mahomed Essof Sahib*. (Suit against alleged lessees—Lease denied and not proved—Suit also based on title—Art. 144 applied)
- (1932) A I R 1932 Oudh 46 (47) : 7 Luck 250 : 137 Ind Cas 678, *Suraj Bali v. Mahadeo Prasad*.
- (1929) 117 Ind Cas 384 (384) (Lah), *Hiralal v. Lalji*.
- (1927) A I R 1927 Mad 287 (287) : 99 Ind Cas 312, *Ramanaujachariar v. Sundarachariar*.
- (1930) A I R 1930 Oudh 310 (311) : 126 Ind Cas 703, *Yakub Khan v. Sheo Dularey*.
- (1938) A I R 1938 Sind 198 (201) : 178 Ind Cas 690, *Arab Jhangli v. Panjal Shah*.

A suit for a declaration of title is not one for possession of immovable property and the question of onus in such suits is strictly not relevant to a discussion of the question of onus in possessory suits. The decisions, however, dealing with the question of onus in declaratory suits are so often referred to in suits under Articles 142 and 144, that it may not be without advantage to refer to them.

Arts. 142 & 144
Note 87

Where a person sues for a declaration of his proprietary title to immovable property, and proves such title, it is for the defendant to show that the title has been lost by the plaintiff by his (defendant's) adverse possession of the property for the statutory period.²⁰ Where a person sues for a declaration of title to property on the ground that he has acquired such title to it by adverse possession for the requisite period, the onus is obviously on him to show his adverse possession for the statutory period.²¹ It is not for the defendant to show in such cases that the plaintiff was not in possession adversely to him for the requisite period. In *Secretary of State for India v. Chellikani Rama Rao*,²² a claim was preferred by an objector under the Madras Forest Act to certain property on the ground that he had, as against the Government, acquired title thereto by adverse possession for the requisite period. The claimant was in law in the same position as a person suing in the ordinary Courts of Justice for a declaration of right. It was contended that it was for the Government—defendant—who was *prima facie* the owner of the property (being the bed of a navigable river) to show that it had a subsisting title. Their Lordships of the Privy Council observed as follows:

"Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were correct, it would be open to the possessor for a year or a day to say 'I am here, be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions'

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- (1935) A I R 1935 Mad 754 (755) 156 Ind Cas 531, *Sulaiman Bowther v. Dawood Khan Sahib*.
 (1939) A I R 1939 Nag 7 (9), *Maherbhan Lalli v. Yusuf Khan Kallu*.
 20 (1917) A I R 1917 All 180 (181) 37 Ind Cas 794, *Mahomed Kamil v. Habbullah*.
 21. (1930) A I R 1930 P C 281 (282) 11 Lah 633 57 Ind App 273 127 Ind Cas 537 (P C), *Jahandad Khan v. Abdul Ghafur*.
 (1921) A I R 1921 Bom 177 (179) 45 Bom 789 61 Ind Cas 410, *Fas'a Baji-wani v. Secretary of State*.
 (1929) A I R 1929 All 753 (753) 51 All 1042 119 Ind Cas 6, *Kankariya Lal v. Girwar*.
 (1937) 167 Ind Cas 801 (801) (Nag), *Ramaji Gujar v. Kankariya Gujar*.
 22. (1916) A I R 1916 P C 21 (26 27) 33 Mad 617 43 Ind App 192 33 Ind Cas 902 (P C)

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Notes 87-88

"It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession. * * * In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the plaintiff * * * nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for a period of sixty years, that fundamental fact remains and that fact forms 'subsisting title'."

The onus in such suits, i. e. suits for declaration of title on the ground of its having been acquired by possession for a certain period, is not only to prove possession for the requisite period but also to prove that such possession had all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. In *Moothavar v. Kunharan Kutty*,²³ where the plaintiff sued for the establishment of his title to certain property, their Lordships of the Privy Council observed as follows :

"Standing a title in A, the alleged adverse possession of B must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is on the adverse possessor. Accordingly, where the holder of a title proves that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds."

In a suit for *confirmation* of possession by declaration of title, the plaintiff must show not only that he is in possession but also that he has a title.²⁴

Where A claims title to land which has been re-formed after submersion, the onus is on him to show that he was the owner thereof before the submersion.²⁵ See also Note 70 *ante*.

88. Judgment against third party does not alter onus.—A judgment not *inter partes* cannot, in a suit for possession, alter the burden of proof as between rival claimants in the suit.¹

23. (1922) A I R 1922 P C 181 (184) : 48 I. A. 395 : 44 Mad 883 : 66 I. C. 451 (P C).

24. (1873) 19 Suth W R 282 (282), *Shah Oseer Ali v. Shah Mukbool Ali*.

25. (1935) A I R 1935 P C 125 (126) : 156 Ind Cas 548 (P C), *Taraldas Acharjee v. Secretary of State*

{1925} A I R 1925 Cal 1230 (1231) : 88 Ind Cas 567, *Panchanon Sarhar v. Basantha Kumari*.

Note 88

1. (1937) A I R 1937 P C 69 (75) : 167 Ind Cas 329 : 16 Pat 258 : 31 Sind L R 242 (P C), *Kesho Prasad Singh v. Mt. Bhagjogna Kuer*.

89. Question immaterial when evidence has been let in on both sides.—Where evidence has been let in by both sides, it cannot matter subsequently by which party it was given.¹ In other words, the question of burden of proof is immaterial where evidence has been let in on both sides

**Arts. 142 & 143.
Notes 89-90**

90. Starting point.—In a suit falling under Article 142, time runs from the *date of dispossession*, where the suit is based on dispossession,¹ or if the suit is based on *discontinuance* of possession, from the date of such discontinuance.² Where, after a dispossession, the owner succeeds in getting back possession but is again subsequently dispossessed, time for a suit for possession will run from the second dispossession.³ Thus, where the plaintiff was ousted by Government and possession was subsequently restored to the plaintiff and then he was again ousted by the Government, it was held that

Note 89

- 1 (1917) A I R 1917 P C 18 (20) 44 Cal 858 44 Ind App 104 40 Ind Cas 337 (P C), *Basanta Kumar Roy v. Secretary of State*.

Note 90

1. (1918) A I R 1918 Lower Bur 131 (181, 182, 184) : 41 Ind Cas 722, *Appan Charan v. Kyause Ma*.
 (1922) A I R 1922 Bom 243 (244) . 46 Bom 920 : 66 Ind Cas 764, *Mahamad Sahib Ibrahim Sahib v. Tilokchand*.
 (1890) 1890 Bom P J 175, *Zuna Francis v. Manoel*.
 (1935) A I R 1935 Cal 702 (704) . 159 Ind Cas 1101, *Hemendra Nath v. Jnanendra Prasanna* (Last full owner dispossessed—Subsequent interposition of widow's estate—Time runs from date of dispossession.)
 (1867) 2 Agra 235 (236), *Saligram v. Meheentail*. (Decree-holder dispossessed after taking possession privately and not through Court)
 (1919) A I R 1919 Oudh 154 (157, 158) . 50 Ind Cas 180, *Mt. Mahadevi Kunwar v. Mt. Bahu Rani Sahiba*.
 (1867) 2 Agra 125 (126), *Seth Oodey Kurrum v. Chait Ram*.
 (1935) A I R 1935 Oudh 425 (426) 156 Ind Cas 92, *Wahid Ali v. Mahboob Ali Khan*.
 (1935) A I R 1935 Cal 228 (229, 230), *Jnanada Prasanna v. Hemendra Nath*.
 (1929) 119 Ind Cas 8 (9) (All), *Daldeo v. Muloo*.
 (1921) A I R 1921 Pat 36 (36) 57 Ind Cas 717 5 Pat L Jour 592, *Madan Mohan Singh v. Bray Bihari Lal*.

(as

book
uld.
late

not
by

A's heirs—Date of dispossession or discontinuance is date when A left village)

- (1921) A I R 1921 Pat 36 (36) 57 Ind Cas 717 5 Pat L Jour 592 *Madan Mohan Singh v. Bray Bihari Lal* (Starting point is date of dispossession or discontinuance and not date when plaintiff ceases to occupy land)

3. (1923) A I R 1923 Cal 270 (271) 61 Ind Cas 479, *Guruch Chandra Lal v. Dattuntha Nath Singh*.

**Arts. 132 & 144
Note 90**

the plaintiff was entitled to reckon the period of limitation from the date of the second dispossession.⁴

Suppose now that the rightful owner obtains possession from the defendant under a *decree of Court*, but the decree is subsequently reversed in appeal, with the result that the defendant is put back in possession by dispossessing the owner. Does such dispossession furnish a cause of action to the rightful owner and can he reckon limitation from such dispossession? There is a difference of opinion on the point. In *Degumbery Dossee v. Annundnath Roy*,⁶ it was held that a brief possession for a few weeks under a decree subsequently set aside was not such a possession as to entitle the plaintiff to calculate limitation from that time. In *Motee Singh v. Leelanund Singh*,⁶ Loch, J., was of the opinion that possession given under an erroneous order of Court which is subsequently rectified and the party deprived of possession, cannot enable a plaintiff to defeat a defendant's plea of adverse possession. Glover, J., the other Judge in the same case, differed from that view and held that any possession not obtained by force or fraud, takes the case out of the statute of limitation. In *Sayed Nasruddin v. Venkatesh Prabhu*,⁷ it was held by the High Court of Bombay that an ouster by the Court consequent on the reversal of the decree under which possession had been given to the rightful owner, cannot furnish any cause of action for the rightful owner against the defendant who was previously in possession. This view was followed by the High Court of Madras in *Narayanan Chetty v. Kannammai Achi*,⁸ and in *Kaliaperumal v. Chidambaram*.^{8a} In *Lakshmipathayya v. Ramachendra*,⁹ the same High Court expressed a contrary view, namely, that the continuity

(1929) A I R 1929 Nag 129 (120) : 117 Ind Cas 281, *Narbad v. Chhoti*. (There is no difference when the possession is wrongfully obtained with the assistance of a revenue officer and when it is obtained by a wrongful entry.)

(1936) 40 Cal W N 1019 (1020), *Ramesh Chandra v. Dud Mehar Bibi*.

(1880) 6 Cal L Jour 472 (487), *Mir Wasirudin v. Lala Deoks Nandan*.

(1906) 33 Cal 821 (825) : 10 Cal W N 1081, *Jonab Sheekh v. Maharaja Suraya Kant Acharyya*.

(1878) 2 Cal L Jour 1 (6), *Mamtaruddin Bhuian v. Barkatulla*.

(1918) A I R 1918 Cal 48 (49) : 45 Ind Cas 548, *Hari Das v. Debendro Ram Banerjee*.

(1933) A I R 1933 Lah 22 (23) : 140 Ind Cas 590, *Mohan Lal v. Fatoo*.

[See also (1897) 1 Cal W N 569 (571), *Jagubandhu Bhattacharjee v. Hari Mohun Ray*. (Person entitled to property receiving rent and profits from Magistrate for period of attachment under S. 146, Criminal P. O.—Limitation does not run against him during such period as he has constructive possession)]

4. (1864) 1864 Suth W R Spe No. 4 (6) : 1 Hay 37 : Marsh 13 (F B), *Ranee Surnomoyee v. The Collector of Rungpore*.

5. (1864) 1864 Suth W R (Gap) 43 (43).

6. (1869) 11 Suth W R 49 (51, 52) : 2 Beng L R A G 173.

7. (1879) 5 Bom 392 (386).

8. (1905) 28 Mad 338 (342). (Correctness doubted in A I R 1929 Nag 129.)

8a (1916) A I R 1916 Mad 733 (739) : 29 Ind Cas 10. (Following 11 Suth W R 49)

9 (1917) A I R 1917 Mad 699 (691) : 35 Ind Cas 421.

of the possession which the defendant must establish for the statutory period, would be broken by the delivery to the rightful owner of possession under a decree of the Court even though such decree was subsequently reversed in appeal. In *Narbadi v. Ohhoti*,¹⁰ the Nagpur Judicial Commissioner's Court has also dissented from the Calcutta, Bombay and the earlier Madras views referred to above. It is submitted that the view expressed in the later Madras decision and by the Judicial Commissioner's Court of Nagpur is correct. In order that an owner may lose his property by the adverse possession of another, it is necessary not only that he should be out of possession, but that another should be in continuous possession during the whole of the period prescribed. It cannot be said that either of these elements exist, where, during such period, possession is obtained through Court by the owner under a decree even though such decree is reversed subsequently as being erroneous. It has been held in the undermentioned case¹¹ of the Calcutta High Court that even a forcible dispossession by the true owner of the wrongdoer will prevent the running of time and that this would be so even if the wrongdoer should get back possession from the plaintiff in pursuance of a decree under Section 9 of the Specific Relief Act, 1877.

Subsequent transactions between the defendants themselves will not give a fresh starting point. Certain villages belonging to a zamindar were sold for arrears of Government revenue and the purchaser was put into possession of the property sold. Subsequently, the Government made a fresh grant, by way of zamindari, of the villages, to the purchaser. It was held that the cause of action for the suit by the original zamindar on the ground that the revenue sale was not binding on him is the original dispossession and not the subsequent grant by the Government to the purchaser, which did not give a fresh cause of action.^{11a}

In a suit falling under Article 144 of the Act, time runs from the date when the possession of the defendant *becomes adverse* to the plaintiff.¹² The question *when* the possession of the defendant

10. (1929) A I R 1929 Nag 129 (129) 117 Ind Cas 281.

11. (1905) 9 Cal W N 1061 (1064), *Protap Chandra v. Durgacharan* (Dissenting from 12 Suth W R 9, 22 Suth W R 259 and 12 Cal L R 486. The decision is also opposed to the view expressed in 12 Suth W R 452.)

11a. (1874) 1 Ind App 335 (341) 22 Suth W R 187 3 Sar 39 3 Suther 30 (PC), *Chaitanyachundra v. Collector of Ganjam*

12. (1910) 8 Ind Cas 1095 (1095) 33 All 224, *Ram Lalhan Das v. Gajadhar Das*

(1895) 19 Bom 809 (814), *Moro Narayan Joshi v. Balaji Raghunath*.

(1911) 9 Ind Cas 791 (794) 35 Mad 231, *Partasarathi Naiten v. Lalshama Naiten*.

(1909) 2 Ind Cas 314 (315) (Mad), *Madhata Gowadu v. Laksharatha Patrao*

(1921) A I R 1921 Bom 48 (48) 45 Bom 570 59 Ind Cas 405 *Pamachandra Balicant v. Balaji Ganesh*

(1891) 1891 Bom P J 232, *Seshu v. Venkatraman*

(1935) 164 Ind Cas 61 (62) 62 Cal 321 *Uppurthi v. S. S. Srinivasulu Aundhu*

Arts. 142 & 144 Notes 90-91 becomes adverse to the plaintiff is one of fact to be decided with reference to the facts and circumstances of each case.¹³ Possession *after suit* cannot be reckoned in computing the period of the defendant's adverse possession.¹⁴

91. Defendant made party after limitation.—When a person is added as a defendant subsequent to the institution of a suit for possession, the suit as against him cannot be treated as having been instituted till the date on which he was made a party (see Section 22 *ante*). If, therefore, a person in possession is added as defendant more than twelve years after the accrual of the cause of action, the suit will be barred as against him.¹ But where a defendant is impleaded in proper time but claims his share of the suit property in a written statement submitted twelve years after the cause of action, his claim will not be barred by limitation.² See also Sections 3 and 22, *ante*.

- (1934) A I R 1934 Nag 36 (38) : 30 Nag L R 284 : 148 Ind Cas 62, *Ganpat-rao v. Vithabai*
 (1919) A I R 1919 Cal 240 (242) : 50 Ind Cas 45, *Tarachand v. Secretary of State*.
 (1865) 2 Suth W R 185 (186), *Eshan Chunder Rai v. Kali Coomar Rai*.
 (1912) 16 Ind Cas 865 (867) . 40 Cal 173 . 17 Cal W N 137 : 16 Cal L J 202, *Prosonno Kumar Mookerjee v. Sri Kantha Ray*.
 (1923) A I R 1923 Lah 642 (643) : 73 Ind Cas 357, *Sarup Singh v. Pal Singh*.
 (1933) A I R 1933 Bom 217 (221) : 57 Bom 709 : 148 Ind Cas 385, *Hamid-miya v. Naqindas*.
 (1928) A I R 1928 Lah 910 (911) . 109 Ind Cas 561, *Piara Ram v. Sohawa*.
 (1917) A I R 1917 Lah 236 (237) : 37 Ind Cas 412, *Arursingh v. Solakahan Singh*.
 (1916) A I R 1916 Oudh 223 (225) : 32 Ind Cas 376, *Mahomed Mumtas Ali Khan v. Harpal Singh*.
 (1869) 12 Suth W R 44 (45), *Shahabooddeen v. Moulvie Naduroojuma*.
 (1872) 18 Suth W R 38 (39), *Nobin Chunder Roy v. Radha Pearse Dabee*.
 13. (1923)

been resumed and settled with the zamindar by the Government.—Commencement of adverse possession of the zamindar after the resumption and settlement with him must be determined with regard to the facts of each case)

14. (1916) A I R 1916 Mad 415 (417) : 29 Ind Cas 168, *Ratna Bai v. Official Assignee*.

possession enured also for the benefit of A.J.]

Note 91

1. (1927) A I R 1927 Cal 216 (218) : 54 Cal 114 : 100 Ind Cas 293, *Mt. Asru-fannessa Khatus v. Hem Chandra*.
- (1912) 16 Ind Cas 420 (421) (Mad), *Rangacharlu Chettiar v. Muthukarnapam Kothan*.
- (1892) 15 Mad 19 (29), *Byathanma v. Arulla*.
2. (1929) A I R 1929 Bom 345 (347) : 58 Bom 472 : 119 Ind Cas 656, *Rayegarda Hanmantraya v. Ramalingappa Shidgardappa*.

92. **Tacking.** — As has been seen in Note 87 *ante*, it is for the *defendant*, in a suit governed by Article 144, to show that he has been in continuous adverse possession for twelve years. The word “defendant” in this Act includes persons from or through whom the defendant derives his liability to be sued. (See Note 17 *ante*.) In view of the said definition it is clear that, in computing the period of twelve years’ adverse possession under Article 144, the adverse possession of the defendant in the suit can be tacked on to the adverse possession of the person *from or through whom the defendant derives his liability to be sued*. In other words, if the suit is one governed by Article 144, a succession of wrongdoers *claiming through one another* can defeat the right of the owner by tacking on the periods of their adverse possession, though the possession of each one of them has been only for a period of less than twelve years.¹ But where the wrongdoers do not claim from or through one another, that is, if they are *independent trespassers* on the property, their possession cannot be tacked on together for the purpose of computing the period of limitation under the Article.²

Arts. 142 & 14
Note 92

Note 92

1. (1919) A I R 1919 Pat 176 (177). 49 Ind Cas 767, *Ratan Kumar Mahto v Kanglee Kumar Mahto*. (Devisee of a trespasser can tack on the period of his devisor's possession to that of his own.)
 (1935) A I R 1935 Mad 449 (451), *Rajagopala Naidu v. Ramasubramanian Ayyar.* (Heir of the trespasser.)
 (1926) A I R 1926 All 697 (698); 96 Ind Cas 687, *Sajjad Hussain v. Qurban Ali Beg.*
 (1892) 16 Bom 197 (199), *Ali Sahib v Kajis Ahmed.* (Auction-purchaser derives title from him who has been dispossessed by another person; such purchase cannot be tacked, as against prior possessor)
"Asam Man."
- (1923) A I R 1923 Rang 261 (265). 1 Rang 176 75 Ind Cas 31, *Mahomed Hadji Mahomed* (Do)
 (1895) 19 Bom 620 (621), *Harijutan v. Shikaram* (Purchaser from a vendee who remains in adverse possession against a prior vendee)
 (1894) 18 Bom 37 (40), *Nandet v. Ramachandra Gomaaji.* (Transferee from judgment-debtor who is in adverse possession of property after court-sale.)
 (1935) A I R 1935 Oudh 425 (427) 156 Ind Cas 92 : 11 Luck 297, *Wahid Ali v. Mahboob Ali Khan.*
 (1906) 3 All L Jour 424 (425) 1906 All W N 184, *Dabu Ram v Banke Bihari Lal.*
 (1921) A I R 1921 All 889 (891) 43 All 164 61 Ind Cas 546, *Mt Ram Puars v. Dudh Sen*
 (1906) 9 Oudh Cas 230 (231, 232), *Nageshar v. Sheo Mangal*
 (1889) 13 Bom 160 (165), *Padajurat v. Ramrat.*
 (1916) A I R 1916 Oudh 50 (56, 57) 93 Ind Cas 371 18 Oudh Cas 2-9.
Ghusa Singh v. Gajraj Singh
 Cas 270, *Krushna f Mohm-Ld. v Parn Elias.*
 trust is effective
 D4 10 Ind Cas 327

Illustrations

1. *A's* land becomes submerged under water, and, on its re-formation *in situ*, is taken possession of by Government. Some time later, on *B's* application that it may be delivered to him on the ground that it was a re-formation *in situ* of what was his land before, the Government gives the property to him and he enters into possession. *B* cannot, for the purpose of computing the period of twelve years under Article 144, tack on his possession

(1934) A I R 1934 P C 23 (28) : 147 Ind Cas 545 : 61 Ind App 78 : 61 Cal 262 (P C), *Secretary of State v. Debendra Lal*.

(1920) 56 Ind Cas 764 (1925) (All), *Prabhu Dayal v. Salla Dayal* (Member of sion.)

(1915) A I R 1915 Oudh 143 (144) : 28 Ind Cas 357 : 18 Oudh Cas 61, *Sheoambar Singh v. Balbhadra Singh*. (Joint decree-holder cannot add the period of judgment-debtor's possession to his own possession to make up adverse possession against the other joint decree-holder.)

(1898) 23 Bom 710 (714) : 1 Bom L R 203, *Mahamad v. Amanji*.

(1914) A I R 1914 Mad 505 (506) : 16 Ind Cas 43 (44) : 37 Mad 440, *Veeramma v. Chinnna Reddy*.

(1934) A I R 1934 Bom 273 (276) : 58 Bom 410 : 154 Ind Cas 824, *Anant Ganpati v. Vishnu Rambhau*.

(1898) 2 Cal W N 315 (317), *Guroo Churn Dutt v. Krishna Moni Gupta*.

(1916) A I R 1916 Oudh 50 (56, 57) : 18 Oudh Cas 289 : 33 Ind Cas 371, *Ghisa Singh v. Gajraj Singh*.

(1935) A I R 1935 Oudh 425 (427) : 156 Ind Cas 92 : 11 Luck 297, *Wahid Ali v. Mahboob Ali Khan*.

(1906) 9 Oudh Cas 230 (231), *Nageshar v. Sheo Mangal*.

(1912) 16 Ind Cas 225 (233) (Mad), *Veeraragava Thathachariar v. Srinivasa Thathachariar*.

(1930) A I R 1930 Lah 809 (811) : 129 Ind Cas 491, *Abdul Ghani v. Bhagat Ram*.

(1938) A I R 1938 Bom 210 (212) : 175 Ind Cas 93, *Naru Shidhu v. Krishna Shidhu*.

(1935) 58 Bom 410 : 154 Ind Cas 824, *Anant Ganpati v. Vishnu Rambhau*.

(1935) 58 Bom 410 : 154 Ind Cas 824, *Anant Ganpati v. Vishnu Rambhau*.

(1923) A I R 1923 Rang 261 (265) : 75 Ind Cas 31 : 1 Rang 176, *Ma Ma v. Hadji Mahomad*.

(1926) A I R 1926 Oudh 313 (314) : 92 Ind Cas 825 : 29 Oudh Cas 131, *Sukhdeo v. Mt. Ram Dulari*.

(1916) A I R 1916 Lah 21 (21) : 47 Ind Cas 189, *Hussain Baksh v. Pala Singh*.

(1921) A I R 1921 Bom 48 (48) : 45 Bom 570 : 59 Ind Cas 805, *Ramchandra Balwant v. Balaji Ganesh*.

(1933) A I R 1933 Cal 898 (900) : 60 Cal 1032 : 148 Ind Cas 1177, *Abdul Latif v. Hamed Gazi*.

(1917) A I R 1917 Pat 471 (473) : 41 Ind Cas 114 : 2 Pat L Jour 506, *Midnapore Zamindari Co. v. Panday Sardar*.

(1910) 5 Ind Cas 273 (275) (All), *Gajadhar Rai v. Ramlakhan Rai*.

(1919) A I R 1919 Cal 766 (767) : 49 Ind Cas 751, *Chandrao Daya Bhatta-chargjee v. Chandrakala*.

(1895) 1895 Bom P J 216, *Lakshman Vithuys v. Vithu Patlu*.

(1927) A I R 1927 Cal 488 (489) : 54 Cal 450 : 103 Ind Cas 124, *Satis Chandra v. Hashem Ali*.

(1910) 5 Ind Cas 1035 (1035) (All), *Ram Lakhan Rai v. Gajadhar Rai*.

to that of the Government as he cannot be said to derive his liability to be sued from or through the Government.³

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Note 92

2. *A*, a mortgagee of property from *X*, is in adverse possession of a right of fishery in water adjoining the property, and after redemption of the mortgage the mortgagor continues in adverse possession of the fishery. *X* can tack on his possession to that of *A*. The mortgagee and his mortgagor cannot be said to be independent trespassers.⁴

3. Pending disputes as to the title to certain property, the Collector took possession of the disputed land in order to secure the Government revenue. Subsequently, it handed over the land to *B* and also paid him the surplus profits remaining after deducting the Government revenue. It turned out that the land really belonged to *A* who thereupon sued *B* for possession. It was held that *B* was not entitled, for the purposes of computing the period of limitation, to tack on his period of possession to that of the Government, inasmuch as he did not claim under the Government.⁵ Further, in that case, the possession of the Government was not a wrongful possession at all as it was entitled to attach and be in possession of the property for the purpose of collecting the Government revenue.

It is of course necessary that in order to complete a title by adverse possession by tacking on the periods of possession of two or more persons, that the possession of each of those persons must have been adverse to the true owner.⁶ There was a conflict of opinion, however, on the question whether the character of the possession of the different persons should be the same. According to one view

(1933) A I R 1933 Nag 274 (277) . 30 Nag L R 18 . 150 Ind Cas 679, *Mt. Jyibai v. Zabu*

(1849) 18 L J Q B 306 (309) L R 13 Q B 945 . 13 Jur 915, *Doe d. Mary Carter v. Barnard*

[See (1938) A I R 1938 Cal 689 (690) : 178 Ind Cas 846, *Utchmatan Bibi v. Rajendra Nath*.

(1935) A I R 1935 Pesh 133 (135) . 158 Ind Cas 968, *Mulla Ahmad v. Fazal Ahmad*. (If second trespasser has obtained possession otherwise than through first, his possession cannot be tacked)]

3. (1917) A I R 1917 P C 18 (22) 44 Cal 838 44 Ind App 104 . 40 Ind Cas 337 (P C), *Basanta Kumar v. Secretary of State*

4. (1934) A I R 1934 P C 23 (28) 147 Ind Cas 545 61 Ind App 78 61 Cal 262 (P C), *Secretary of State v. Debendra Lal Khan*

5. (1882) 5 All 1 (6, 7) 9 Ind App 99 5 Shomc L R 20 4 Sar 352 (P C), *Karan Singh v. Bakar Ali Khan*

6. (1918) A I R 1918 Cal 532 (534) 42 Ind Cas 884, *Ganendra Nath Sanjay v. Mohendra Mohini Debya* (Period of possession under title cannot be tacked on to the period of possession without title to complete a title by adverse possession)

(1909) 1 Ind Cas 322 (324) 83 Bom 317, *Anurita Raoji Shridhar Narayan*.

(1873) 10 Bom H C R 225 (230), *Shidajiraj v. Nolejiraj*

(1915) A I R 1915 Mad 121 (122) 21 Ind Cas 346, *Pannuswamy Iyer v. Permaye*

(1923) A I R 1923 Cal 82 (83, 84) 77 Ind Cas 564 *J. K. Das v. T. K. Das*

(1934) A I R 1934 Pat 31 (32) 146 Ind Cas 811 *Shamu Lalajit v. Ram Das Lalajit*

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Note 92

this was necessary before any tacking could be allowed.⁶² Thus, it was held that a mortgagee, for example, from a trespasser could not tack his possession on to that of his mortgagor so as to defeat the right of the true owner.⁷ A contrary view, namely that the identity of the nature of possession was not necessary, was held in the under-mentioned cases.⁸ The conflict must now be taken to have been settled by the decision of their Lordships of the Privy Council in *Secretary of State v. Debendra Lal Khan*,⁹ where their Lordships held that a mortgagor can tack on his possession to that of his mortgagee who had trespassed on the land of a third person adjoining the mortgaged property. Their Lordships observed: "There can be no question that a mortgagor, for the purposes of the Limitation Act, can avail himself of or 'tack' on to his own adverse possession the adverse possession of his mortgagee."

It has been seen in Note 87 *ante*, that where a suit is one governed by Article 142 of the Act, the *onus* is on the plaintiff to show that he was dispossessed or that he discontinued his possession within twelve years of the suit. The question of the tacking of adverse possession by successive trespassers does not arise in such a case. Where, after the dispossession of the plaintiff but within twelve years thereof the trespasser goes out of possession and, *after an interval*, another trespasser gets into possession, the latter trespass operates as a *fresh dispossession* of the plaintiff. The reason is that during such interval, possession would, as seen in Note 64 *ante*, automatically revert in the owner with the result that limitation which was running against him would cease so to run. The entry, therefore, of the second trespasser *after* the interval would be a fresh dispossession of the plaintiff furnishing a fresh starting point.

62(1914) A I R 1914 Lah 458 (460) : 22 Ind Cas 855, *Baldeo Singh v. Mohan Singh*.

(1875) 23 Suth W R 331 (332), *Dhun Monee Chowdhraim v. Golam Kasom*.
(Lessor and lessee)

..... hatap.

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(1918) A I R 1918 Oudh 214 (216) : 47 Ind Cas 687, *Mt. Saiyed-un-nissa v. Maiku Lal*. (Mortgagor and mortgagee.)

(1922) A I R 1922 Bom 211 (212) : 46 Bom 1009 : 70 Ind Cas 912, *Bai Rera v. Vali Mahomed*.]

7. (1918) A I R 1918 Oudh 214 (216) : 47 Ind Cas 687, *Mt. Saiyed-un-nissa v. Maiku Lal*.

(1889) 1889 Pun Re No. 169, *Bhagat Hiranand v. Lal Khan*.

(1922) A I R 1922 Bom 211 (212) : 46 Bom 1009 : 70 Ind Cas 912, *Bai Rera v. Valimohammad*.

(1889) 1889 Pun Re No. 189, *Ditu v. Detti Dial*.

8. (1911) 10 Ind Cas 545 (546) (All), *Bani Madho v. Debi Saran*.

(1912) 16 Ind Cas 420 (421) (Mad), *Rangachariu Chettiar v. Muthulazapankotham*.

(1931) A I R 1931 All 19 (18, 19) : 52 All 976 : 130 Ind Cas 697, *Praklad Singh v. Barumal*.

9. (1934) A I R 1934 P C 23 (23) : 147 Ind Cas 545 : 61 Ind App 78 : 61 Cal 262 (P C).

The position would be different where there is *no interval* between the adverse possession of the first trespasser and that of the second, as where the first trespasser, while in possession, is himself dispossessed by the second trespasser. In such a case the possession does not revert in the owner after the date of the dispossession of the first trespasser, so that the subsequent dispossession of the first trespasser by the second is not a dispossession of the owner. In *Willis v. Earl Howe*,¹⁰ which was a case in which the plaintiff had been dispossessed and the land had thereafter been in the adverse possession of several persons who did not claim through one another, it was contended that if the period of possession of each of them was less than the statutory period, the plaintiff could not lose his title. Kay, L. J., observed as follows:

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Note 92

"The effect of that (that is, the contention) would be that, if a series of occupiers not claiming under one another kept out the real owner for hundred years, time would only run against him when the last of such occupiers entered into possession. I am of opinion that it is not the law. A *continuous* adverse possession for the statutory period, through a succession of persons not claiming under one another, does, in my opinion, bar the true owner."

The case of *Agency Co. v. Short*¹¹ was distinguished on the ground that there was an interval between the periods of possession of two trespassers.

It follows, therefore, that a suit governed by Article 142 of the Act would be barred even if several persons, independent of one another, have been in adverse possession, each for less than the statutory period, provided the plaintiff has been continuously kept out of possession for twelve years after the dispossession.¹² It has been, however, held in some cases¹³ that when the possession passes

10. (1893) L. R. 2 Ch. 545 (553) 41 W. R. (Eng.) 433 (435, 436) 62 L. J. Ch. 690
2 R. 427 69 L. T. 358

11. (1888) 37 W. R. (Eng.) 433 (434) : 58 L. J. P. C. 4 13 App. Cas. 793 59 L. T. 677
53 J. P. 192.

12. Halsbury (Hailsham Edition), Vol. 20, page 745

(1912) 16 Ind. Cas. 420 (421) (Mad), *Rangacharlu Chettiar v. Muthukarnayan Kothan*

(1917) A. I. R. 1917 Nag. 7 (13) 14 Nag. L. R. 82 43 Ind. Cas. 943 (*Ganno v. Beri*)

(1921) A. I. R. 1921 Bom. 49 (48) 45 Bom. 570 59 Ind. Cas. 805, *Ramachandra Balwant v. Balaji Ganesh*.

[See also (1931) A. I. R. 1931 Oudh. 177 (226) 136 Ind. Cas. 642, *Mahomed Arim Khan v. Mahomed Saadat Ali Khan* (At page 226 Narayana, J. says "In the present case all three alleged trespassers were in possession under a common agreement, namely the compromise and decree of the Court.")]

(1930) A. I. R. 1930 Lah. 809 (811) 129 Ind. Cas. 491 (*Chand Lal v. Bhagut Ram*)

(1922) A. I. R. 1922 Mad. 69 (61) 45 Mad. 370 67 Ind. Cas. 46 (*Perumal Ramiah v. Kusru Kallamma*)

13. See cases cited in Foot-Note (4) to Note 75 ante.

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Notes 92-93

from the first to the second trespasser, there is a *momentary* restoration of the true title to possession. It is submitted that this view is not correct.

93. Effect of adverse possession.—As has been seen in the Notes to Section 28 *ante*, where *A* is in adverse possession of land belonging to *B* for a period of twelve years or more, *B*'s title is extinguished, and *A* gets a good title to the land.¹ If *A* is subsequently dispossessed by *B*, *A* is entitled to sue *B* for possession and *B* cannot resist the same on the ground that he had title and was rightly in possession.² By such dispossession *B* is not remitted to his

Note 93

1. See Note 6 to Section 28, *supra*.

- [See also (1926) A I R 1926 Oudh 226 (227) : 92 Ind Cas 247, *Sheo Nandan v. Hira Lal*.
 (1877) 3 Cal 224 (226, 227), *Gossain Dass Chunder v. Issur Chunder Nath*.
 (1886) 1886 Pun Re No. 16, *Daya Ram v. Badri Mal*.
 (1927) A I R 1927 Mad 244 (245) : 98 Ind Cas 860, *Raman Menon v. Madharan Menon*. (Adverse possession of tarwad property by member of Tavazhi—Right of tarwad is lost.)
 (1912) 17 Ind Cas 148 (149) : 37 Bom 37, *Maganchand Fulchand v. Vithalrao Kamalrao*.
 (1918) A I R 1918 Cal 950 (951) : 88 Ind Cas 957 : 45 Cal 756, *Bhusan Chandra Ghose v. Sarkanta Banerjee*. (Case under Bengal Tenancy Act.)
 (1930) A I R 1930 All 441 (442) : 125 Ind Cas 476, *Basj Nath Prasad v. Dharam Pal Singh*.
 (1920) A I R 1920 Nag 51 (51) : 16 Nag L R 87 : 55 Ind Cas 499, *Laxman v. Govind*.
 (1902) 12 Mad L Jour 387 (388), *Kone Gounden v. Bola Naicken*.
 (1909) 3 Ind Cas 599 (599) : 1909 Pun Re No. 85, *Dhan Singh v. Har Narain*. (Entry in wajib-ul-arz after defendants had acquired title by adverse possession that plaintiffs can take the land back when they return—No trust created in plaintiff's favour.)
 (1904) 27 Mad 262 (268), *Venkata Krishna Row v. Venkappa*.
 (1927) A I R 1927 Nag 330 (330) : 103 Ind Cas 697, *Krishna v. Narayan*.
 (1935) A I R 1935 Pat 164 (165) : 155 Ind Cas 1094 : 14 Pat 424, *Nando Kahar v. Bhup Narain Singh*.
 (1867) 11 Moo Ind App 345 (363) : 7 Suth W R 24 : 1 Suther 676 : 2 Sar 284 (P C), *Gunga Gobind Mundul v. Collector of 24 Pergunnahs*.
 (1933) A I R 1933 Oudh 427 (429) : 148 Ind Cas 831, *Abdur Rahman Khan v. Ahmad Khan*.]

2. See Note 6 to Section 28, *supra*.

- [See also (1897) 21 Bom 509 (514), *Budesab v. Hanmanta*.
 (1923) A I R 1923 Mad 633 (634) : 72 Ind Cas 635, *Ammakannu Ammal v. Narayanasami Mudaliar*.
 (1889) 14 Bom 222 (226), *Hargovandas Lakshmidas v. Dajibhai Jijibhai*. (Possessory owner acquires absolute title and is entitled to sue for and obtain a declaration of such statutory title)
 (1867) 11 Moo Ind App 345 (361) : 7 Suth W R 21 : 1 Suther 676 : 2 Sar 284 (P C), *Gunga Gobind Mundul v. Collector of 24-Pergunnahs*]

old title.³ In the undermentioned case,⁴ *A* who was in adverse possession for the statutory period was thereafter dispossessed by *B*. *A* then sued *B* for possession within twelve years of such dispossession. It was held that *A* was entitled to recover.

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Notes 93-95

Where the principal right to sue for possession is extinguished under Section 28, rights accessory thereto will also be extinguished.⁵

94. Adverse possessor can get only what quondam owner had. — See Note 6 to Section 28, *ante*.

95. Adverse possessor gets a title only to the interest he purports to prescribe for. — It has been seen in Note 6 to Section 28 *ante*, that the right that is acquired by prescription cannot be anything more than what the wrongdoer purported to prescribe for. Thus, where a Hindu woman enters into possession of property to which she is not entitled, claiming only the limited estate of a Hindu woman under the Hindu law, she will acquire a limited estate by prescription.¹ Similarly, where the wrongdoer

3 See Note 6 to Section 28, *supra*.

[See also (1925) A I R 1925 Oudh 20 (23) 84 Ind Cas 98, *Mt. Mahmud-un-nissa v. Zabid Raza*.

(1899) 21 All 204 (208) : 1899 All W N 36, *Dalip Rai v. Deohi Rai*.

(1873) 20 Suth W R 114 (115) · 11 Beng L R 237, *Brindabun Chunder Roy v. Tara Chand Banerjee*.

(1920) A I R 1920 Cal 800 (803) : 60 Ind Cas 165, *Kassim Hassan v. Hazra Begum*.

(1928) A I R 1928 Nag 280 (280) : 109 Ind Cas 401, *Kapoor v. Nanhi*.

(1873) 21 W R (Eng) 693, *Bryan v. Cowdal*

(1858) 27 L J Ex 297 (299) 114 R R 1033 · 1 F & F 27, *Brassington v. Lleuellyn*

(1907) 6 Cal L Jour 621 (636), *Lelabati Mesra v. Beshun Chobey*.
(Title to office of shebait and to endowed property)]

4 (1901) 24 Mad 387 (395, 396) 5 Cal W N 545 28 Ind App 81 · 3 Bom L R 303 7 Sar 619 (P C), *Khadanga Garu v. Mahapatrulu Garu*.

5. See Note 6 to Section 28, *supra*.

[See also (1931) A I R 1931 Lah 648 (649) · 134 Ind Cas 1106, *Karam Dad v. Rehmat*]

Note 95

1. (1928) A I R 1928 Nag 329 (331) 114 Ind Cas 454, *Mahepat v. Mukundrao*.
(1931) A I R 1931 All 450 (451) 133 Ind Cas 790, *Shantlar Lal v. Damodar Das*.

(1933) A I R 1933 All 822 (824, 825) 147 Ind Cas 220, *Dunjar Singh v. Mt. Masud Kunwar*

(1914) A I R 1914 Bom 47 (50) 38 Bom 227 · 24 Ind Cas 716, *Firsab Kasimsab v. Gurappa Birsappa*.

(1914) A I R 1914 Nag 81 (82) 10 Nag L R 35 23 Ind Cas 719, *Sheo Lal v. Mt. Sheo Rajya*

(1926) A I R 1926 Oudh 497 (498) 95 Ind Cas 482, *Mt. Ram Rajya v. Balbhaddar*.

(1928) A I R 1928 Oudh 227 (228) 112 Ind Cas 400, *Pekari v. Ramdaran*.

(1928) A I R 1928 Pat 220 (221) 7 Pat 163 107 Ind Cas 151, *Saraj Lall Singh v. Tilak Dhari Singh*

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Note 95

enters into possession claiming only to be a tenant,² or a manager,

2. (1928) A I R 1928 P C 146 (149) : 7 Pat 649 : 109 Ind Cas 663 : 55 Ind App 212 (P C), *Kamakhya Narayan Singh v. Ram Raksha Singh*.
- (1936) A I R 1936 P C 183 (187) : 162 Ind Cas 465 : 63 Ind App 261 : 59 Mad 809 (P C), *Ponnambala v. Periyannan Chetty*.
- (1908) 85 Cal 470 (476) : 12 Cal W N 636 : 7 Cal L Jour 499, *Ichharan Singh v. Nilmoney Bahida*. (As tenant.)
- (1905) 2 Cal L Jour 125 (135), *Ishan Chandra Mitter v. Raja Ramranjan*. (When a tenant takes possession of lands outside his tenancy and professes to do so in his character as tenant, the landlord is dispossessed in a limited sense, in other words, he is deprived of actual or khas possession of the lands but not of proprietary possession of possession by receipt of rent.)
- (1922) A I R 1922 Cal 185 (186) : 68 Ind Cas 1003, *Ujir Ali Saidar v. Shadhas Behara*.
- (1909) 3 Ind Cas 431 (432) (Cal), *Barail Badri Sahi v. Chamra Uraon*.
- (1933) A I R 1933 Pat 269 (270) : 145 Ind Cas 613, *Ramdeyal Mahanti v. Pitam Bours*.
- (1914) A I R 1914 Cal 51 (53) : 20 Ind Cas 823, *Protap Narain Mukerjee v. Bvraj Das*.
- (1922) A I R 1922 Cal 193 (194) : 69 Ind Cas 7, *Satyendra Nath Banerjee v. Krishnasakha Kar*.
- (1924) A I R 1924 Cal 45 (47) : 50 Cal 487 : 74 Ind Cas 193, *Bhaurabendra Narain v. Rajendra Narain*.
- (1914) A I R 1914 Cal 196 (197) : 20 Ind Cas 664, *Probbabati Das v. Taibaturnessa*.
- (1919) A I R 1919 Cal 124 (124). 49 Ind Cas 437, *Subal Chandra Chowdhury v. Sutanhar Barua*.
- (1926) A I R 1926 Cal 952 (953) : 95 Ind Cas 101, *Sadanand Mandal v. Jyotish Kanta Roy*.
- (1913) 19 Ind Cas 863 (864) (Cal), *Motilal Roy v. Kalu Mandal*.
- (1914) A I R 1914 Cal 743 (743) : 18 Ind Cas 616, *Kali Charan Saha v. Dabirrudin Ahammad*.
- (1925) A I R 1925 Mad 1226 (1227) : 88 Ind Cas 924, *Rama Rao v. Appu*.
- (1925) A I R 1925 Cal 1189 (1191) : 69 Ind Cas 747, *Suarnamoyi v. Sourindra Nath*.
- (1927) A I R 1927 Lah 39 (39) : 98 Ind Cas 870, *Sohela v. Baggu Singh*.
- (1915) A I R 1915 Cal 738 (738) : 28 Ind Cas 703, *Panchhari Chattapadhya v. Maharaj Bahadur Singh*.
- (1918) A I R 1918 Oudh 122 (123) : 47 Ind Cas 930, *Sheo Gobind v. Ambika Prasad*.
- (1937) A I R 1937 Pat 422 (423, 424) : 170 Ind Cas 335, *Chandra Mohan Singh v. Butu Mian*.
- (1934) A I R 1934 Pat 339 (340, 341) : 149 Ind Cas 453, *Kameshwar Singh Bahadur v. Fatuni Misra*.
- (1928) A I R 1928 Cal 47 (48) : 105 Ind Cas 85, *Jamiruddee Naskar v. Dasanta Kumar Roy*.
- (1922) A I R 1922 Pat 619 (622, 624) : 65 Ind Cas 892, *Dhonulal Chowdhury v. W. A. Vincent*.
- (1934) A I R 1934 Pat 458 (461) : 150 Ind Cas 102, *Nalinikanta Mukerji v. Gobinda Ramanuj Das*.
- (1932) A I R 1932 Mad 828 (832) : 137 Ind Cas 487, *Periyannan Chetty v. Govinda Rao*.
- (1904) 9 Cal W N 292 (299) *Bagdu Mayhi v. Durga Prasad Singha*.
- (1920) A I R 1920 Oudh 147 (149) : 60 Ind Cas 717, *Fazal Haq v. Ruzviya Khanam*.
- (1912) 16 Ind Cas 53 (55) (Mad), *Narsya Udga v. Venkataramana Bhatta*.

trustee or mutawalli of an institution,³ he will, after twelve years of such possession, acquire only the right claimed. On the same principle, where *A* and *B* are in possession of property belonging only to *A* as the joint property of *A* and *B*, such enjoyment by *B* is adverse to *A*, so far as his separate right thereto is concerned, and, if *A*'s suit for separate possession is barred, his right to separate possession would be barred with the consequence that *B* would acquire a right to joint possession.⁴ See also the undermentioned cases.⁵ In the case

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Note 95**

- (1929) A I R 1929 Bom 174 (175) 117 Ind Cas 438, *Narhar Narayan v. Ganpati Hari*.
- (1883) 7 Bom 96 (99), *Maidin Saiba v. Nagapa*.
3. (1888) 12 Bom 322 (324), *Mulji Bhulabhai v. Manohar Ganesh*. (As manager of idol.)
- (1915) A I R 1915 Mad 1003 (1009) : 26 Ind Cas 841, *Ambalavana Pandarasandhi Atergal v. Minakshy Sundereswara Devasthanam*. (Do)
- (1926) A I R 1926 Mad 496 (500) : 94 Ind Cas 489, *Brahmayya v. Madhuram*. (Do)
- (1928) A I R 1928 Mad 268 (270, 271) 108 Ind Cas 199, *Pichai Pella v. Lingam Iyer*. (As trustee)
- (1914) A I R 1914 Mad 477 (479, 480) 37 Mad 873 14 Ind Cas 168, *Pattas-lara Manakkal Kuppen v. Choorakkapathul Mundekottul* (Do)
- (1930) A I R 1930 All 866 (868) 129 Ind Cas 375, *Abdul Alim v. Abdul Hamid* (As mutawalli)
4. (1901) 24 Mad 387 (396) : 28 Ind App 81 3 Bom L R 303 5 Cal W N 545 . 7 Sar 819 (P C), *Khadanga Garu v. Mahapatrulu Garu*. (Art. 142 applies to such cases.)
- (1913) 18 Ind Cas 869 (872, 875) (Cal), *Dwarka Nath Chowdhury v. Shasthi-lankar Bannerjee*.
- (1930) A I R 1930 Bom 333 (335) 127 Ind Cas 204, *Babaji Daso v. Jitaji Yeshwant* (Person even after adoption treated as, and openly exercising rights as member of joint family of his birth, can acquire title to joint possession by adverse possession)
- (1923) A I R 1923 Nag 65 (66) 74 Ind Cas 51, *Mt Munga v. Lachmi-prasad*
- [See however (1938) A I R 1938 Cal 117 (119) 176 Ind Cas 706, *Bera-jullah Sarkar v. Ayafullah Akand*. (Mere fact that *A* is in joint possession with *B* of latter's property does not show that *A*'s joint possession is adverse to *B*)]
5. *Claim as mortgagee*
- (1912) 16 Ind Cas 420 (421) (Mad), *Rangachari Chettiar v. Muthukarnap-pan Kothan*.
- (1921) A I R 1921 All 262 (264) 43 All 127 55 Ind Cas 633, *Abdulla v. Shams ul-Haq*
- (1932) A I R 1932 All 53 (55) 136 Ind Cas 63, *Laxdeo Rai v. Jaimangal Rai*
- (1932) A I R 1932 All 893 (897) 54 All 628 140 Ind Cas 653, *Sulak Lai v. Patch Mahomed*
- (1889) 18-9 Pun Re No 18-1 *Datu v. Dets Dasi*
- (1924) A I R 1924 Mad 292 (294 295 296) 47 Mad 203 79 Ind Cas 510, *Appamma v. Chinnaidu*
- (1917) A I R 1917 Oudh 116 (117) 20 Oudh Cas 208 41 Ind Cas 862, *Bihari v. Adva Nath*
- (1913) 19 Ind Cas 891 (892) 87 Bom 580 *Talukdari Settlement Officer v. Rithadasi*.
- (1913) 20 Ind Cas 468 (469) (All) *Lam Saray v. Garra Sakas*
- (1920) 123 Ind Cas 195 (196) (Mad) *Attaiya Dhara v. Appamma Lakshmi*

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cited below,^{5a} the High Court of Patna expressed a doubt whether a tenancy or a mortgage right which are creatures of *contract* can be at all acquired by adverse possession. This view is against the

Claim as under-proprietor :

- (1901) 4 Oudh Cas 207 (209), *Harnandan v. Bhup Indar Bikhram Singh*.
- (1917) A I R 1917 Oudh 28 (29) : 42 Ind Cas 196, *Nageshwar Datt Ram v. Cheddi Singh*.
- (1920) A I R 1920 Oudh 7 (8) : 56 Ind Cas 759, *Nadir Singh v. Mt. Angurna Kunwar*.
- (1929) A I R 1929 Oudh 433 (433, 434) : 5 Luck 330 : 122 Ind Cas 332, *Sat Narain Misur v. Deputy Commissioner Ajodhya Estate*.

Claim as ex-proprietary tenant :

- (1914) A I R 1914 All 64 (65) : 22 Ind Cas 269, *Ulfat Rai v. Basdeo*.
- (1916) 39 Ind Cas 483 (484) (All), *Ram Dhar Singh v. Jugul Singh*.
- (1914) A I R 1914 All 317 (318) : 37 All 22 : 26 Ind Cas 21, *Baldeo v. Ulfat Rai*. (Exproprietary tenancy cannot be acquired by adverse possession.)
[But see (1929) A I R 1929 All 498 (498) : 117 Ind Cas 620 : 51 All 760, *Paras Ram Singh v. Raj Kumar Singh*.]

Other cases of claim to limited interest :

- (1927) A I R 1927 Nag 67 (68) : 22 Nag L R 181 : 98 Ind Cas 540, *Channu v. Subheti*.
- (1934) A I R 1934 All 868 (870) : 57 All 166 : 149 Ind Cas 797, *Sheo Raj Chamar v. Mudeer Khan*. (Where certain persons buried the dead bodies of their family on the land of another for 30 years, it was held that the former acquired the right by sheer adverse possession.)
- (1896) 21 Bom 509 (516, 517), *Budesab v. Hanmanta*. (Partial interest in land may be lost by adverse possession.)
- (1903) 5 Bom L R 186 (189), *Yamunabai v. Dhondi*. (Limited interest found to have been asserted and acquired.)
- (1914) A I R 1914 Bom 47 (51) : 38 Bom 227 : 24 Ind Cas 716, *Pir Sab Kasim Sab v. Gurappa Basappa*. (Life estate.)
- (1909) 35 Cal 470 (476, 477) : 7 Cal L Jour 499 : 12 Cal W N 636, *Icharam Singh v. Nilmony Bahida*.
- (1905) 2 Cal L Jour 125 (136), *Ishan Chandra Mitter v. Raja Ramranjan*.

lands as being included in their putni, held that their claim was restricted to limited interest and so their possession was adverse to that extent only.)

- (1919) A I R 1919 Cal 782 (788) : 47 Ind Cas 315 (S B), *Shib Chandra Roy v. Havendra Chandra Rai*.
- (1925) A I R 1925 Cal 1189 (1191) : 89 Ind Cas 747, *Swarnamoyi v. Sourindra Nath*.
- (1930) A I R 1930 Cal 339 (341) : 126 Ind Cas 259, *Satya Prosanna v. Kali Prosanna Das*.
- (1890) 18 Mad 467 (471), *Santharan v. Periaswami*.
- (1923) A I R 1923 Mad 153 (159) : 74 Ind Cas 27, *Abuvalkar v. Kunhikutts Yak*.
- (1916) A I R 1916 Oudh 167 (168, 169) : 36 Ind Cas 725, *Shambhu Dayal v. Chandra Shekhar*. (Acquisition of franchise)
- (1925) A I R 1925 Pat 739 (740) : 86 Ind Cas 771, *Rameshar Singh v. Rit Lal Singh*.
- (1910) 5 Ind Cas 930 (930) (Mad), *Raman Nair v. Pannangath Chandu*. (The receipt of rents for more than 12 years as Melcharathdars gives a title by prescription to the holder of the Melcharath.)
- (1913) 19 Ind Cas 367 (368) (Cal), *Lahuri Bibi v. Bijoy Chand Mahata*.
- (1929) 115 Ind Cas 141 (143) (All), *Rajai v. Behari Lal*.
- 5a. (1938) A I R 1938 Pat 479 (490) : 176 Ind Cas 35, *Bhukhan Mian v. Radhika Kumari Devi*.

generally accepted view, and, it is submitted, cannot be accepted as correct.

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Notes 95-96**

The nature and effect of possession must depend upon the nature and extent of the rights asserted by the conduct or the express declaration of the person in possession.⁶ The question thus depends upon the *animus possidendi* with which the possession is held by the adverse possessor.⁷

By virtue of the special provisions of the C. P. Tenancy Act, a tenancy cannot, in the Central Provinces, be acquired by prescription.⁸

96. Evidence of adverse possession.—The word "possession" is a legal term and the evidence that would satisfy a Court that a party was in possession would be evidence of acts giving rise to the inference that such party was in possession. It must be remembered that acts sufficient to constitute possession in the owner may not be sufficient to constitute possession in the trespasser.^{1a} Much importance cannot be attached to the evidence of witnesses who come and swear simply that the land was in the possession of somebody or other.¹ Acts giving rise to the inference of possession may be proved by oral² or by documentary evidence. Entries in Revenue Registers to the effect that a party is in possession are evidence that such party was in possession at the date of the entry.³ *Thak* maps showing

6. (1920) A I R 1920 Oudh 228 (229, 230) . 53 Ind Cas 553, *Muhammad Mumtas Ali Khan v. Ugraj Singh*.

7. (1912) 15 Ind Cas 403 (404) (Mad), *In re Prattipati Seshayya*.

(1903) 5 Bom L R 186 (189), *Yamunabai v. Dhondi*.

(1902) 1902 Pun L R No 140, *Muhammad Buksh v. Ram Singh*. (Adverse possession by a widow against the reversioners commences only when there is an open and unmistakable act to the knowledge of the plaintiff, showing that she wants to hold the property on her account)

(1914) A I R 1914 Mad 800 (300) . 24 Ind Cas 95, *Meethale Mithai Raman v. Puthulath Ambu*

(1916) A I R 1916 Mad 718 (719) . 33 Mad 1 . 17 Ind Cas 112, *Konda Reddi v. Ramaswami Reddi*

(1925) A I R 1925 Mad 1020 (1020) : 86 Ind Cas 433, *Aiyasa Biri Ammal v. Kalandarsa Rowther*.

(1909) 2 Ind Cas 148 (149) (Cal), *Deb Narain Dutt v. Baidya Nath*.

(1914) A I R 1914 Mad 477 (480) . 14 Ind Cas 163 (171) . 37 Mad 873, *Patishara Manakhal Kuppen v. Chorakkappatti Munde Kotil*.

(1911) 10 Ind Cas 194 (196) (Mad), *Aiyanna Charair v. Lakshmi Ammal*.

8. (1912) 17 Ind Cas 606 (608) . 8 Nag L R 163, *Kanhayyalal v. Dular Singh*.

Note 96

1a. (1938) A I R 1938 Mad 454 (455) . 178 Ind Cas 301, *Atchayya Patrudu v. Jalaluddin Sahib*

(1927) A I R 1927 Cal 313 (314) . 100 Ind Cas 523 . 23 Cri L Jour 313, *Loke Nath Roy v. Basal Gani*

1. (1921) A I R 1921 Pat 234 (236) . 57 Ind Cas 744 . 5 Pat L Jour 632, *Gajadhar Prasad Sahu v. Mt. Dulhin Gulab Kuer*.

2. (1868) 9 Suth W R 155 (156), *Dinobhundhoo Suhaye v. Rajah of Durbhanga*.

3. (1869) 11 Suth W R 35 (39), *Umbita Churn Mundie v. Ramdhan Moturur*.

(1922) A I R 1922 Oudh 98 (99) . 65 Ind Cas 334, *Ghulam Sattar v. Mohammad Ali*

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Note 96

a party as being in possession of particular property, are evidence of possession of such property by such party at the time the maps were prepared.⁴ The realization of rents of a particular property is evidence that the person realizing them was in possession of such property,⁵ though the payment of revenue may or may not be an act of ownership.⁶

An inference of adverse possession can be drawn from circumstances such as long possession and the absence of proof of license or agreement between the owner and the occupier.⁷ Where A was in possession of B's land and had constructed residential houses thereon and lived in them without rent, it was held that the possession was *prima facie* adverse to B.⁸ In *Innasimuthu Udayan v. Upakarat Udayan*,⁹ the plaintiff had proved his title; the defendant had a possession admitted by the plaintiff, for seven years prior to the suit. The documentary evidence showing that he had been in possession, for five years immediately preceding those seven years, was similar to the evidence which accompanied his possession during that period.

(1883) 9 Cal 431 (434, 437): 12 Cal L R 12, *Saraswati Dass v. Dhanpat Singh*.

But they do not by themselves operate to extinguish title of the owner unless adverse possession for the statutory period is established; see:

(1928) A I R 1928 Lah 516 (522): 9 Lah 428: 119 Ind Cas 258, *Fateh Ali Shah v. Mahomed Baksh*.

So also a mere entry of land in possession of A in Revenue Records as Government waste does not transfer possession to Government; see:

(1914) 24 Ind Cas 813 (818): 7 Sind L R 169, *Secretary of State v. Mushtak Singh*.

Nor would an entry showing A to be in possession amount to proof of such person's title; see:

(1873) 10 Bom H C R 187 (189), *Fatma kom Nubi Saheb v. Darya Saheb*.

(1889) 13 Bom 75 (77), *Bhogji v. Bapuji*.

[See also (1936) A I R 1936 Lah 37 (40): 165 Ind Cas 626, *Ghulam Mahomed v. Samundar*. (Person continuing in possession of proprietary rights in spite of adverse entry in revenue papers—No question of limitation arises.)]

4. (1928) A I R 1928 Pat 558 (560): 72 Ind Cas 648, *Chattrapat Pratap Bahadur v. C. G. Lees*

(1927) A I R 1927 Cal 345 (346): 102 Ind Cas 370, *Debendra Nath v. Surendra Nath*.

But mere demarcation of land in survey map as in a person's possession is no evidence or is very weak evidence of possession; see:

(1878) 20 Suth W R 285 (285), *Ooma Churn v. Umbika Churn*.

5. (1923) A I R 1923 Nag 95 (96): 69 Ind Cas 883, *Raghuraj v. Vallabhdas*.

(1894) 10 Cal 1112 (1124), *Mullick Abdool Guffoor v. Muleka*.

6. (1923) A I R 1923 Nag 95 (96): 69 Ind Cas 883, *Raghuraj v. Vallabhdas*.

(1872) 17 Suth W R 400 (492), *Lallee Singh v. Mt. Arit Koor*.

7. (1931) A I R 1931 All 323 (325): 130 Ind Cas 296, *Alopi v. Gajadhar Prasad*.

8. (1933) A I R 1933 Sind 279 (281): 27 Sind L R 341. 146 Ind Cas 777 (F B). *Khanu Chuhar v. Panjal Shah*.

(1893) 9 Cal 602 (605): 12 Cal L R 337, *Mohini Mohun v. Krishna Kishore*.

(1936) A I R 1936 Cal 31 (32): 160 Ind Cas 867, *Sm. Amina Bibi v. Akshay Kumar*. (Where a question of acquisition of title by adverse possession has to be determined, clear, full and definite evidence has to be brought in.)

9. (1899) 23 Mad 10 (12, 15): 26 Ind App 210: 7 Sar 620 (P C).

This evidence consisted of a series of documents such as was usually given to and received by the possessor of lands and they extended throughout the period in dispute going back far beyond the twelve years which would operate as a bar to the suit. It was held by their Lordships of the Privy Council that the evidence raised the inference that the same possession continued for more than twelve years.

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Note 96**

In the case of a claim of adverse possession of a fishery right in a particular part of a river, evidence of acts of possession in parts of the river *adjoining* the part actually in dispute is admissible provided there is common character of locality between the different parts.¹⁰ The mere appropriation of fish from a tank may not necessarily constitute adverse possession of the tank, but acts, such as subletting, mortgaging, re-excavation of the tank, or the expenditure of large sums of money in clearing silt, are acts obviously of proprietary character constituting adverse possession.¹¹

Acts alleged to create adverse possession must be scrutinized in the light of the relationship that exists between the parties who assert against each other the title by adverse possession.¹² Thus, acts, during the lifetime of a widow, such as repairs, payment of taxes, etc. by the reversioners, cannot be evidence of adverse possession.¹³ The mutation in the Revenue Register of a Mahomedan son's name is not an assertion of any hostile title to the step-mother especially where both of them live amicably together.¹⁴ In the case of forest and immemorial waste land in Canara, the presumption is that it belongs to Government. In order to rebut this presumption it is not sufficient merely to show such acts as the Government usually permits in forest and waste land for the benefit of the adjoining cultivators, but must consist of acts of undoubted ownership such as the granting of leases to tenants for cultivation and the cutting of valuable timber for sale.¹⁵

An *unregistered document*, in respect of a transaction which had only to be made by a registered document, is not admissible to prove that such transaction is valid, but it may be referred to as explaining the nature and character of the possession thenceforth held by a party to the transaction.¹⁶ Thus, where A executed an unregistered

10. (1934) A I R 1934 P C 23 (25, 26) 147 Ind Cas 545 61 Ind App 78 61 Cal 262 (P C), *Secretary of State v. Debendra Lal Khan* (Citing Baron Parke in *Jones v. Williams*, (1837) 2 M & W 326.)

11. (1917) A I R 1917 Cal 644 (646) : 35 Ind Cas 60, *Biroy Chand Mahatab Bahadur v. Iswar Chandra*

[See also (1920) A I R 1920 Mad 295 (301) 55 Ind Cas 609, *Secretary of State v. Venkatarasimha Naidu* (The facts, that plaintiff alone enjoyed fishery in a portion of the river leasing fishery rights, that he controlled over the taking of the sand from the river-bed, show his possession as owner of the river bed).]

12. (1913) 21 Ind Cas 21 (22) (Mad), *Thungarelu Chetty v. Mangathayamma*

13. (1913) 21 Ind Cas 21 (22) (Mad), *Thungarelu Chetty v. Mangathayamma*

14. (1934) A I R 1934 Pesh 7 (8) 145 Ind Cas 926 *Mt Yakut v. Intakul*

15. (1904) 28 Mad 257 (292, 300) 15 Mad L J 147 *Secretary of State v. Mangeshwar Krishnappa*

16. (1919) A I R 1919 P C 44 (47) 43 Mad 244 41 Ind App 255 53 Ind Cas 301 (P C), *Varada Iswar v. Jettarahamma*

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Notes 96-97**

gift in favour of *B*, and *B* entered into possession, their Lordships of the Privy Council held that the possession of *B* became adverse to *A* from that date.¹⁷

See also the undermentioned cases.¹⁸

97. Plea of adverse possession.—Where *A* filed a suit for partition against *B* and for possession of his share on the ground that *A* and *B* were both entitled to the property under a particular document of title and that *A* was in joint enjoyment of the property with *B* up to a particular period, when he was dispossessed by *B*, it

(1925) A I R 1925 Lah 491 (492) : 6 Lah 819 : 88 Ind Cas 872, *Ata Muhammad v. Shankar Das*.

(1927) A I R 1927 Oudh 581 (582) : 103 Ind Cas 662, *Maula v. Irshad Husain*.

(1932) A I R 1932 Cal 634 (636) : 141 Ind Cas 320, *J. C. Galstaun v. Frofulla Kumar De*.

17. (1910) A I R 1919 P C 44 (47) : 43 Mad 244 : 46 Ind App 285 : 53 Ind Cas 901 (P C) *Varada Palle v. ...*

18.

(The plaintiffs had been in possession for many years, but they had never paid any rent in respect of the land and in the village papers they had been recorded as *bila faisla* tenants whereas the tenants were recorded as proprietors. Held, that the facts were not sufficient to establish a title by adverse possession.)

(1883) 1883 All W N 246 (247), *Phundo v. Bhushua Das*. (A few acts such as granting of leases, execution of mortgage, are not sufficient for creating title by adverse possession.)

(1872) 17 Suth W R 195 (197), *Collector of Furreedpore v. Kalee Doss Hazrah*. (The evidence of Government having sent its officers to measure the land and to surround it with pillars is the very best evidence of possession of a lately formed chur.)

(1915) A I R 1915 Cal 625 (626) : 80 Ind Cas 914, *Kadir Dux v. Dvrendra Kishore* (If one possession by the defendant)

of adverse possession.)

(1927) A I R 1927 Mad 456 (457, 458) : 101 Ind Cas 96 *Secretary of State*

(The felling of the trees scattered on the site should not change the character of possession of the plaintiff.)

(1929) A I R 1929 Oudh 328 (330) : 114 Ind Cas 815, *Jagatjit Singh v. Muhammad Asgar Ali* (If the owner allowed other persons to cross the boundary and occupy an area of 25 acres, and plant thereon a number of trees and forbid the owner's men to enter the land and his possession extends for a period of over 12 years, a title will be obtained)

was held by their Lordships of the Privy Council that on failure of the proof of the title alleged, the plaintiff could rely on the plea that he had acquired a right to the property by adverse possession for the requisite period. Their Lordships observed as follows :

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"Then comes in Section 28 by which his right to the property is extinguished at the determination of the period limited for bringing a suit for possession of it. The point does not require to be expressly pleaded, as it is only evidence of the respondent's title."¹

The High Court of Allahabad has interpreted this decision as having held that when a person sues on the ground of title, he can, without more, show that he got the title by adverse possession.² This view has not been accepted in the generality of cases. In *Somasundaram Chetty v. Vadivelu Pillai*,³ it was held by the High Court of Madras, following a decision of the High Court of Calcutta in *Shro Kumari Debi v. Gobind Shaw Tanti*,⁴ that a plaintiff who came to Court alleging title, without more, cannot be allowed to succeed on the basis of title by adverse possession. In *Nepen Bala Debi v. Siti Kanta Banerji*,^{4a} their Lordships of the Calcutta High Court observed as follows

"Where no case of acquisition of title by adverse possession is made in the plaint nor is the question raised directly or indirectly in any of the issues, the plaintiff ought not to be

(1923) A I R 1923 All 565 (565) . 74 Ind Cas 879, *Ragha Mal v. Abdus Sattar*. (Kabuliats and application to the municipality may not be sufficient to prove possession but *prima facie* counter-part of leases executed by tenants and applications for permission to build put in the Municipal Board are the best possible evidence of possession)

(1915) A I R 1915 Mad 145 (149) 26 Ind Cas 537, *Gobinda Das v. Venkata Perumal* (Strong evidence is necessary to rebut adverse possession of auction-purchaser put in complete practicable possession)

(1881) 7 Cal L R 269 (270, 271), *Kussessur Roy v. Jaggodishury* (The fact that certain land in village being measured by the revenue authorities as appurtenant to a certain estate is *prima facie* evidence of possession of the land at the time of the survey by the owner of such estate)

(1921) A I R 1921 Cal 754 (758) 61 Ind Cas 469, *Monmotha Nath v. Anath Bundhu*. (The fact that certain lands were entered in a road cess return filed by a person in respect of lands held by him under the Zamindar is *prima facie* evidence that they were not held adversely to the Zamindar, and the presumption cannot be got over unless it is

Note 97

1. (1900) 24 Mad 337 (396) 23 Ind App 81 3 Bom L R 303 . 5 Cal W N 545 : 7 Scr 819 (P C), *Khadanga v. Mahapatralu*.

2. (1931) A I R 1931 All 670 (672) . 133 Ind Cas 26, *Municipal Board, Etawah v. Mt Ram Sri*

3. (1908) 31 Mad 531 (532) 4 Mad L Tim 344

4. (1877) 2 Cal 418.

See also the following case to a similar effect —

(1899) 11 Suth W R 550 (551-552), *Huro Sundares Debi v. Unnao-
poorna Debi*

4a (1910) 8 Ind Cas 41 (43, 44) (Cal).

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- (1925) A I R 1925 Lah 491 (492) : 6 Lah 319 : 88 Ind Cas 872, *Ata Muhammad v. Shankar Das*.
 (1927) A I R 1927 Oudh 581 (582) : 103 Ind Cas 662, *Maula v. Irshad Husam*.
 (1932) A I R 1932 Cal 634 (636) : 141 Ind Cas 320, *J. C. Galstaun v. Frofulla Kumar De*.
 17. (1919) A I R 1919 P C 44 (47) : 43 Mad 244 : 46 Ind App 285 : 53 Ind Cas 901 (P C), *Varada Pillai v. Jeerathammal*.
 18. (1931) A I R 1931 Sind 1 (2) : 25 Sind L R 257 : 130 Ind Cas 546, *Jamiatrai Manjmal v. Goumal*. (Mere user cannot be taken as definite assertion of proprietary rights and does not constitute adverse possession.)
 (1931) A I R 1931 Oudh 144 (144) : 181 Ind Cas 400, *Dabu v. Thakur Deen*. (The plaintiffs had been in possession for many years, but they had never paid any rent in respect of the land and in the village papers they had been recorded as *bila faisla* tenants whereas the tenants were recorded as proprietors. Held, that the facts were not sufficient to establish a title by adverse possession.)
 (1883) 1883 All W N 246 (247), *Phundo v. Bhishua Das*. (A few acts such as granting of leases, execution of mortgage, are not sufficient for creating title by adverse possession.)
 (1872) 17 Suth W R 195 (197), *Collector of Furreedpore v. Kalee Doss Hazrah*. (The evidence of Government having sent its officers to measure the land and to surround it with pillars is the very best evidence of possession of a lately formed *chur*.)
 (1915) A I R 1915 Cal 625 (626) : 30 Ind Cas 914, *Kadir Bux v. Birendra Kishore*. (Long possession by the defendant on his own behalf far beyond the statutory period—No payment of rent by the defendants and no receipt of rent by the plaintiff in respect of the lands in suit—Held that these were the elements required for a plea in bar by reason of adverse possession.)
 (1927) A I R 1927 Mad 456 (457,458) : 101 Ind Cas 96, *Secretary of State v. Muthukumara Pillai*. (The erection and open use of a pucca thatched building on a site forming part of *natham puramboke* for a period of over 60 years used by the plaintiff and co-parcener for the purpose of tethering cattle and storing hay etc., and the fact of the enclosure of the site by a *kalli* fence all round, constitute adverse possession as against Government and the fact that the Government levied assessment on some of the trees scattered on the site should not change the character of possession of the plaintiff.)
 (1929) A I R 1929 Oudh 328 (330) : 114 Ind Cas 815, *Jagatjit Singh v. Muhammad Asgar Ali*. (If the owner allowed other persons to cross the boundary and occupy an area of 25 acres, and plant thereon a number of trees and forbid the owner's men to enter the land and his possession extends for a period of over 12 years, a title will be obtained by adverse possession.)

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The High Court of Allahabad has interpreted this decision as having held that when a person sues on the ground of title, he can, without more, show that he got the title by adverse possession.² This view has not been accepted in the generality of cases. In *Soma-sundaram Chetty v. Vadivelu Pillai*,³ it was held by the High Court of Madras, following a decision of the High Court of Calcutta in *Shiro Kumari Debi v. Gobind Shaw Tanti*,⁴ that a plaintiff who came to Court alleging title, without more, cannot be allowed to succeed on the basis of title by adverse possession. In *Nepen Bala Debi v. Siti Kanta Banerji*,⁵ their Lordships of the Calcutta High Court observed as follows .

"Where no case of acquisition of title by adverse possession is made in the plaint nor is the question raised directly or indirectly in any of the issues, the plaintiff ought not to be

(1923) A I R 1923 All 565 (565) . 74 Ind Cas 879, *Ragha Mal v. Abdus Sattar*. (Kabulats and application to the municipality may not be sufficient to prove possession but *prima facie* counter-part of leases executed by tenants and applications for permission to build put in the Municipal Board are the best possible evidence of possession)

(1915) A I R 1915 Mad 145 (149) . 26 Ind Cas 537, *Gobinda Das v. Venkata Perumal* (Strong evidence is necessary to rebut adverse possession of auction-purchaser put in complete practicable possession)

(1881) 7 Cal L R 269 (270, 271), *Kussessur Roy v. Jaggodishury* (The fact that certain land in village being measured by the revenue authorities as appurtenant to a certain estate is *prima facie* evidence of possession of the land at the time of the survey by the owner of such estate)

(1921) A I R 1921 Cal 754 (758) . 61 Ind Cas 469, *Monmotha Nath v. Anath Bundhu* (The fact that certain lands were entered in a road cess return filed by a person in respect of lands held by him under the Zamindar is *prima facie* evidence that they were not held adversely

Note 97

1. (1900) 24 Mad 337 (396) . 29 Ind App 81 : 3 Bom L R 303 . 5 Cal W N 515 : 7 Scr 819 (P C), *Khadanga v. Mahapatraulu*.

2. (1931) A I R 1931 All 670 (672) . 133 Ind Cas 26, *Municipal Board, Firozah v. Mt. Ram Srs.*

3. (1905) 31 Mad 531 (532) . 4 Mad L Tim 314.

4. (1877) 2 Cal 418.

See also the following case to a similar effect —

(1909) 11 Suth W R 590 (551, 552), *Huro Soon Luree Debi v. Unno-purna Debi*.

4a (1910) 8 Ind Cas 41 (43, 44) (Cal).

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allowed to succeed upon such a case. On the other hand, as pointed out by this Court in the case of *Lalabati Misra v. Bishur Chobey*,^{4b} when the question reduces itself to one of law upon facts admitted or proved beyond controversy, it is not only competent to the Court but expedient in the interests of justice to entertain the plea of adverse possession, if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. The true test, therefore, to be applied to determine whether the plea of title by adverse possession should be allowed to be urged, though not explicitly raised in the plaint, is, how far the defendant is likely to be prejudiced if the point is permitted to be taken."

The same view has been taken in a number of other cases.⁵ A person may therefore succeed on a title by adverse possession pleaded for the first time in the Court of Appeal, if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise.⁶ Where, however, the plaintiff has not based his title on adverse possession, nor is the question raised in the issues, nor any evidence let in, it cannot be pleaded for the first time in first appeal,⁷ or in second appeal.⁸

4b.(1907) 6 Cal L Jour 621 (635).

5. (1919) A I R 1919 Cal 339 (340) . 33 Ind Cas 639, *Bata Krista Pramanick v. Jogendra Nath Masti*. (Whether plaintiff can succeed on such plea depends mainly on whether defendant is or is not taken by surprise and also on the facts of each case)

(1917) A I R 1917 Cal 469 (475, 478) : 36 Ind Cas 890, *Ramchandra Sil v. Ramanant Das* (Do)

(1933) A I R 1933 Lah 25 (26) : 13 Lah 677 : 140 Ind Cas 604, *Shivromani Gurdwara Parabandhak Committee v. Prem Das* (The question of adverse possession is a mixed question of law and fact ; and if a party claims title by adverse possession it is his duty to make clear allegations in the plaint and to lead evidence as regards facts from which he asks the Court to draw an inference of his adverse possession.)

(1925) A I R 1925 Mad 1005 (1010) . 88 Ind Cas 249, *Rangappa Nayakar v. Rangasamy Nayakar*. (Adverse possession should be expressly pleaded in plaint or at least as an alternative ground.)

(1929) 117 Ind Cas 318 (319) (Pat), *Alimuddin v. Salim*. (A declaration of title by adverse possession cannot be given on a title not distinctly stated in the plaint or in the issues.)

(1906) 3 Cal L Jour 316 (330, 331), *Ananda Hars Basak v. Secretary of State*. (Where adverse possession is not pleaded in the plaint, the plaintiff cannot succeed on the ground of adverse possession.)

(1881) 7 Cal 560 (563), *Krishna Churn v. Protab Chunder*.

6. (1926) A I R 1926 Pat 192 (194) : 5 Pat 441 : 92 Ind Cas 177, *Mt. Batisa Kuer v. Raja Ram Pandey*.

7. (1927) A I R 1927 Lah 522 (524) . 102 Ind Cas 476, *Mauli v. Del Ram*.

(1874) 22 Suth W R 216 (219), *Protab Chunder v. Collector of Goualparah*.

(1924) A I R 1924 Lah 468 (469) : 60 Ind Cas 321, *Wair Chand v. Nathu Ram*.

8. (1909) 3 Ind Cas 711 (712) . 5 Low Bur Rul 82, *Po Mga v. Ma Le*.

A defendant who sets up a title and also pleads limitation, may succeed on limitation even if he is unable to prove his title.⁹

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Where the plaintiff pleads that the defendant is in possession as his licensee, but the defendant denies it and sets up adverse possession, he cannot subsequently rely upon the license or its revocation but must fail if he is unable to establish adverse possession.¹⁰

98. Question of adverse possession, if one of law or fact.— Possession is a question of fact,¹ and the extent of the possession may also be a question of fact.² So also is the question whether a person has been dispossessed of certain property.^{2a} In *Secretary of State v. Subramania Thevar*,³ it was observed by their Lordships of the Privy Council as follows :

"The question whether there has been a persistent claim of right to a tract of land is, their Lordships need hardly say, a question of fact. Such assertion being proved, all questions as

(1929) 115 Ind Cas 680 (681) (Pat), *Mahomed Sayed Khan v. Abdul Gafoor*.

(1926) A I R 1926 Bom 40 (42) 49 Bom 817 91 Ind Cas 349, *Rachappa Channasappa v. Ningsappa Kasappa*

(1934) A I R 1934 All 692 (693) 151 Ind Cas 355, *Peare Lal v. Nath Singh*

(1935) A I R 1935 Oudh 397 (392) 155 Ind Cas 23, *Mt. Rajana v. Musahab Ali*

(1909) 4 Ind Cas 1167 (1167) (Mad), *Appayya Manigaran v. Muthuswamy Pillai*

(1924) A I R 1924 Cal 245 (248) 81 Ind Cas 29, *Anil Kumar v. Rash Mohan*.

(1933) A I R 1933 Bom 26 (33) 141 Ind Cas 103, *Narayan Balwant v. Dallatraya Ramcandra* (Plea of adverse possession, cannot be taken for first time in second appeal especially when facts on record are insufficient.)

(1917) A I R 1917 Cal 817 (817) 37 Ind Cas 942, *Priyanath Mitter v. Anath Nath Dev.*

[See (1922) A I R 1922 Pat 398 (399) 69 Ind Cas 185 1 Pat 23, *Khub Lal Upadhyay v. Juggish Prasad Singh*.]

[See also (1923) A I R 1923 Lah 259 (259) 73 Ind Cas 817, *Deok Ram v. Dulh Chand*.]

9. (1883) 7 Bom 96 (99), *Maidin Saiba v. Nagopa* (Defendant can plead both tenancy and adverse possession)

(1868) 9 Suth W R 131 (132), *Nobokishore Dey v. Ramkrishen Mohurir*.

(1903) 7 Cal W N 294 (296), *Keamuddin v. Hara Mohan Mondul*.

10. (1919) A I R 1919 All 403 (404) 52 Ind Cas 366 41 All 669, *Jai Chand v. Girwar Singh*.

Note 98

1. (1931) A I R 1931 P C 186 (188) 130 Ind Cas 315 10 Pat 407 55 Ind App 29 (P C), *Nageshwar Bux Roy v. Bengal Coal Co*

(1931) A I R 1931 All 823 (824) 130 Ind Cas 296, *Alopi v. Gajadhar*.

(1921) A I R 1921 Lah 264 (265), *Mahomad Azim Khan v. Sultan Ahmad*.

(1922) A I R 1922 Pat 398 (399) 69 Ind Cas 185 1 Pat 23 *Khub Lal v. Juggish Prasad*.

(1923) A I R 1923 All 382 (382) 75 Ind Cas 672, *Bisheshar Nath v. Abdul Wahid*

(1897) 21 Bom 91 (96), *Rajaram v. Ganesh Hari*

(1932) Ind Rul 1932 Lah 628 (629), *Lal Chand Khosla v. Allah Yar*

(1933) A I R 1933 Lah 721 (722) 14 Lah 302 135 Ind Cas 680 (681) *Kalau Mal v. Maman*.

2 (1931) A I R 1931 P C 186 (188) 130 Ind Cas 315 10 Pat 407 55 Ind App 29 (P C), *Nageshwar Bux Roy v. Bengal Coal Co*

2a (1937) A I R 1937 Lah 656 (656) 135 Ind Cas 678, *Devaldas v. Rajaram Khanna*.

3. (1891) 15 Mad 101 (109) 15 Ind App 14 15 Ind Cas 74 15 Ind App 74 (P C).

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to the amount of use and enjoyment of the tract by the claimants and as to the sufficiency of such use and enjoyment to constitute possession of the whole extent claimed, are also, in the opinion of their Lordships, pure questions of fact."

The question whether possession is *adverse* or not is sometimes one of simple fact, but may be a question of law or a mixed question of law and fact.⁴ Whether a person set up adverse claim is a question of fact,⁵ but whether on the facts found an inference can be fairly drawn that such possession is adverse, is one of law.⁶

4. (1868) 9 Buth W R 79 (80), *Ishan Chunder v. Ram Lochun*.
- (1916) A I R 1918 Nag 171 (173) : 47 Ind Cas 892, *Pralhad Singh v. Abdul Aziz Khan*.
- (1891) 19 Ind App 48 (56) : 19 Cal 253 : 6 Sar 133 (P C), *Lachmeswar Singh v. Manowar Hossein*.
- (1909) 4 Ind Cas 244 (244) . 33 Bom 712, *Ganapati Ambadas v. Raghunath Anant*. (The question whether possession is adverse or not is sometimes one of simple fact but it may be a question of law, or a mixed question of law and fact.)
- (1931) A I R 1931 All 823 (324) : 180 Ind Cas 296, *Alopi v. Gajadhar*.
- (1922) A I R 1922 Cal 54 (55) : 68 Ind Cas 200, *Jogendra Nath v. Rajendra Nath*.
- (1927) A I R 1927 Cal 30 (31) : 97 Ind Cas 635, *Abdul Gafur v. Abdul Jabbar*.
- (1929) A I R 1929 Oudh 337 (338, 339) . 115 Ind Cas 440, *Bashir Ahmad v. Parshotam*.
- (1936) A I R 1936 Lah 741 (742) : 166 Ind Cas 607, *Mt. Bhanu v. Ujagar Singh*.
- (1928) A I R 1928 All 291 (291) : 71 Ind Cas 640, *Hafiz Abdullah v. Ali*.
- (1918) A I R 1918 Cal 68 (70) : 51 Ind Cas 123, *Chintamani Pramanik v. Hirday Nath*.
- (1932) A I R 1932 All 393 (396) : 54 All 628 : 140 Ind Cas 653, *Subah Lal v. Fateh Mohamad*.
- (1911) 11 Ind Cas 185 (186) (Cal), *Shookoor Mallik v. Behari Lal*.
- (1933) A I R 1933 Lah 25 (26) . 13 Lah 677 : 140 Ind Cas 604, *Shiromani Gurdwara Prabandhak Committee v. Prem Das*.
- (1895) 21 Bom 91 (96), *Rajaram v. Ganesh Hari*.
- (1935) A I R 1935 Oudh 387 (392) : 155 Ind Cas 23, *Mt. Rajana v. Musahab Ali*.
- (1917) A I R 1917 Cal 817 (817) : 37 Ind Cas 942, *Priyanath Mitter v. Anath Nath Dev*.
- (1921) 60 Ind Cas 298 (301) (Cal), *Balaram Guria v. Syama Charan Mondal*.
- (1937) A I R 1937 All 429 (431) : 169 Ind Cas 962, *Ram Chandra v. Asa Ram*.
- (1924) A I R 1924 Oudh 266 (270) . 27 Oudh Cas 77 : 78 Ind Cas 895, *Indar-pal Singh v. Thakur Din Singh*.
- (1935) A I R 1935 Cal 760 (760) : 159 Ind Cas 752, *Dhabani Prosanna v. Manindra Chandra*.
5. (1933) A I R 1933 Oudh 462 (462, 463) : 146 Ind Cas 937, *Ram Shankar v. Sheo Dutt*.
- (1933) A I R 1933 Lah 721 (722) : 14 Lah 802 : 135 Ind Cas 680, *Kallu Mal v. Maman*.
6. (1929) A I R 1929 Pat 590 (591) : 117 Ind Cas 614, *Jogeyanand v. Girja Nand*.
- (1926) A I R 1926 Lah 482 (482) : 98 Ind Cas 161, *Hakim Ali v. Kartar Singh*.
- (1911) 11 Ind Cas 185 (186) (Cal), *Shookoor Mallik v. Behari Lal*.
- (1921) 60 Ind Cas 298 (301) . 24 Cal W N 1057 (1063), *Balaram Guria v. Shyama Charan*.
- (1934) A I R 1934 All 258 (290) : 149 Ind Cas 607, *Subhadra Kuar v. Ram Sewak*.

99. Adverse possession by or against Crown.—Where the question is one of adverse possession against the Crown, Articles 142 and 144 must be read with Article 149, *infra*.¹ And so reading them, it is clear that no adverse possession can be effectively pleaded against the Crown for a period of less than sixty years.²

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Note 99**

It was held by the Privy Council in *Secretary of State v. Debendra Lal*,³ that there was no difference as regards the requisites of adverse possession between adverse possession against the Crown and adverse possession against a private person except that, in the former case, a much longer period of adverse possession is necessary in order to acquire title. Their Lordships of the Privy Council observed :

"The Limitation Act is indulgent to the Crown in one respect only, namely in requiring a much longer period of adverse possession than in the case of a subject; otherwise there is no discrimination between the Crown and the subject as regards the requisites of adverse possession "

The Crown in that case was the owner of a right of fishery of which it could only be in possession by granting to others leases and licenses to fish. The granting by a person other than the Crown, of leases and licenses to fish, was held to be evidence of usurpation of the distinctive rights of the Crown and was held to be the most significant evidence of adverse possession.

Where a person claims title by adverse possession against the Government, the burden is on him to prove such possession for the full period of sixty years. Proof of adverse possession for a shorter period will not shift the onus to the Government to show that the possession has not continued for the full period of sixty years.⁴

- (1924) A I R 1924 Oudh 266 (270) 27 Oudh Cas 77 : 78 Ind Cas 695, *Indar-pal Singh v. Thakur Din Singh*
 (1926) A I R 1926 Nag 129 (130) 89 Ind Cas 663, *Feshwant v. Daulat*.
 (1938) A I R 1938 Sind 132 (138) 176 Ind Cas 549, *Tahsilram Tachchand v. Mt. Miral*
 (1937) A I R 1937 All 429 (431) 169 I. C. 962, *Ram Chandra v. Asa Ram*.
 (1920) A I R 1920 Lah 293 (294) 54 Ind Cas 873 . 1919 Pun Re No. 170, *Md Umar Khan v. Razi Khan*
 (1938) A I R 1938 Cal 117 (118) 176 Ind Cas 706, *Berojullah Sarhar v. Ayatullah Akand*
 (1931) A I R 1931 Oudh 381 (382) 182 Ind Cas 772, *Sheoraj Narain v. Jagannath Prasad*
 (1917) A I R 1917 All 42 (42) 40 Ind Cas 420, *Champa Lal v. Manjral Chand*.

Note 99

1. (1916) A I R 1916 P C 21 (27) 39 Mad 617 43 Ind App 192 35 Ind Cas 902 (P C), *Secretary of State v. Chellikans Rama Rao*.
2. (1916) A I R 1916 P C 21 (27) 39 Mad 617 43 Ind App 192 35 Ind Cas 902 (P C) *Secretary of State v. Chellikans Rama Rao*.
 (1925) A I R 1925 Mad 750 (755) 48 Mad 570 91 Ind Cas 180 *Krishna Sastri v. Singaravelu*
3. (1934) A I R 1934 P C 23 (25) 61 Cal 202 61 Ind App 75 147 Ind Cas 545 (P C)
4. See Note 9 to Article 149, *ante*.
 See also the cases cited in Foot-Note 4 to Note 9 to Art 149, *infra*.

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Note 98

to the amount of use and enjoyment of the tract by the claimants and as to the sufficiency of such use and enjoyment to constitute possession of the whole extent claimed, are also, in the opinion of their Lordships, pure questions of fact."

The question whether possession is *adverse* or not is sometimes one of simple fact, but may be a question of law or a mixed question of law and fact.⁴ Whether a person set up adverse claim is a question of fact,⁵ but whether on the facts found an inference can be fairly drawn that such possession is adverse, is one of law.⁶

4. (1868) 9 Suth W R 79 (80), *Ishan Chunder v. Ram Lochun*.
 (1916) A I R 1918 Nag 171 (173) : 47 Ind Cas 892, *Prahlad Singh v. Abdul Aziz Khan*.
 (1891) 19 Ind App 48 (56) : 19 Cal 253 : 6 Sar 133 (P O), *Lachmeswar Singh v. Manowar Hossein*.
 (1900) 4 Ind Cas 244 (244) : 33 Bom 712, *Ganapati Ambadas v. Raghunath Anant*. (The question whether possession is adverse or not is sometimes one of simple fact but it may be a question of law, or a mixed question of law and fact.)
 (1931) A I R 1931 All 323 (324) : 130 Ind Cas 296, *Alopi v. Gajadhar*.
 (1922) A I R 1922 Cal 54 (55) : 63 Ind Cas 200, *Jogendra Nath v. Rajendra Nath*.
 (1927) A I R 1927 Cal 30 (31) : 97 Ind Cas 635, *Abdul Gafur v. Abdul Jabbar*.
 (1929) A I R 1929 Oudh 337 (338, 339) : 115 Ind Cas 440, *Bashir Ahmad v. Parshotam*.
 (1936) A I R 1936 Lah 741 (742) : 166 Ind Cas 607, *Mt. Bhani v. Ujagar Singh*.
 (1923) A I R 1923 All 291 (291) : 71 Ind Cas 640, *Hafiz Abdullah v. Ali*.
 (1918) A I R 1918 Cal 68 (70) : 51 Ind Cas 123, *Chintamani Pramanik v. Hriday Nath*.
 (1932) A I R 1932 All 393 (396) : 54 All 628 : 140 Ind Cas 653, *Subah Lal v. Fateh Mohamad*.
 (1911) 11 Ind Cas 185 (186) (Cal), *Shookoor Mallick v. Behari Lal*.
 (1933) A I R 1933 Lah 25 (26) : 13 Lah 677 : 140 Ind Cas 604, *Shiromani Gurdwara Prabandhak Committee v. Prem Das*.
 (1895) 21 Bom 91 (96), *Rajaram v. Ganesh Hari*.
 (1935) A I R 1935 Oudh 387 (392) : 155 Ind Cas 23, *Mt. Rajana v. Musahab Ali*.
 (1917) A I R 1917 Cal 817 (817) : 37 Ind Cas 942, *Priyanath Matter v. Anath Nath Der*.
 (1921) 60 Ind Cas 293 (301) (Cal), *Balaram Guria v. Syama Charan Mondal*.
 (1937) A I R 1937 All 429 (431) : 169 Ind Cas 962, *Ram Chandra v. Asa Ram*.
 (1924) A I R 1924 Oudh 266 (270) : 27 Oudh Cas 77 : 78 Ind Cas 895, *Indar-pal Singh v. Thakur Din Singh*.
 (1935) A I R 1935 Cal 760 (760) : 159 Ind Cas 752, *Bhabani Prosanna v. Manindra Chandra*.
- 5. (1933) A I R 1933 Oudh 462 (462, 463) : 146 Ind Cas 957, *Ram Shankar v. Sheo Dutt*.
 (1933) A I R 1933 Lah 721 (722) : 14 Lah 302 : 135 Ind Cas 680, *Kallu Mal v. Maman*.
- 6. (1929) A I R 1929 Pat 590 (591) : 117 Ind Cas 644, *Jogeyanand v. Girja Nand*.
 (1926) A I R 1926 Lah 492 (492) : 93 Ind Cas 161, *Halim Ali v. Kartar Singh*.
 (1911) 11 Ind Cas 185 (186) (Cal), *Shookoor Mallick v. Behari Lal*.
 (1921) 60 Ind Cas 293 (301) : 24 Cal W N 1057 (1063), *Balaram Guria v. Syama Charan*.
 (1934) A I R 1934 All 258 (260) : 149 Ind Cas 607, *Subhadra Kuar v. Ram Swak*.

99. Adverse possession by or against Crown. — Where the question is one of adverse possession against the Crown, Articles 142 and 144 must be read with Article 149, *infra*¹ And so reading them, it is clear that no adverse possession can be effectively pleaded against the Crown for a period of less than sixty years²

Arts. 142 & 144
Note 99

It was held by the Privy Council in *Secretary of State v. Debendra Lal*,³ that there was no difference as regards the requisites of adverse possession between adverse possession against the Crown and adverse possession against a private person except that, in the former case, a much longer period of adverse possession is necessary in order to acquire title. Their Lordships of the Privy Council observed :

"The Limitation Act is indulgent to the Crown in one respect only, namely in requiring a much longer period of adverse possession than in the case of a subject, otherwise there is no discrimination between the Crown and the subject as regards the requisites of adverse possession "

The Crown in that case was the owner of a right of fishery of which it could only be in possession by granting to others leases and licenses to fish. The granting by a person other than the Crown, of leases and licenses to fish, was held to be evidence of usurpation of the distinctive rights of the Crown and was held to be the most significant evidence of adverse possession.

Where a person claims title by adverse possession against the Government, the burden is on him to prove such possession for the full period of sixty years. Proof of adverse possession for a shorter period will not shift the onus to the Government to show that the possession has not continued for the full period of sixty years.⁴

(1921) A I R 1924 Oudh 266 (270) 27 Oudh Cas 77 78 Ind Cas 695, *Indar-pal Singh v. Thakur Din Singh*

(1926) A I R 1926 Nag 129 (180) 89 Ind Cas 663, *Feshuant v. Daulat*.

(1938) A I R 1938 Sind 132 (138) 176 Ind Cas 549, *Tahiram Tackchand v. Mt. Miral*

(1937) A I R 1937 All 429 (431) 169 I. C. 962, *Ram Chandra v. Asa Ram*.
Ind Cas 873 1919 Pun Re No 170,

Ind Cas 706, *Derojullah Sarkar v.*

Ayidman Asani
(1931) A I R 1931 Oudh 381 (382) 132 Ind Cas 772, *Sheoraj Narain v. Jagannath Prasad*

(1917) A I R 1917 All 42 (42) 40 Ind Cas 420, *Champa Lal v. Mangal Chand*.

Note 99

1 (1916) A I R 1916 P C 21 (27) 39 Mad 617 43 Ind App 192 35 Ind Cas 902 (P C), *Secretary of State v. Chellikani Rama Rao*

2. (1916) A I R 1916 P C 21 (27) 39 Mad 617 43 Ind App 192 35 Ind Cas 902 (P C), *Secretary of State v. Chellikani Rama Rao*

(1915) A I R 1925 Mad 780 (785) 48 Mad 570 91 Ind Cas 130 *Errappa Sastri v. Singaratelu*

3 (1931) A I R 1934 P C 23 (25) 61 Cal 262 61 Ind App 78 147 Ind Cas 545 (P C)

4. See Note 9 to Article 149, ante.

See also the cases cited in Foot-Note 4 to Note 9 to Art. 149, *infra*.

**Arts. 142 & 144
Notes 99-100**

The Crown can, like any other party, acquire title by adverse possession for twelve years.⁵

99a. Adverse possession by or against the public.—The freehold of all soil not shown to be vested in any individual or corporation is in the Crown.¹ The public may have rights of *user* over it as in the case of highways and waterways, but this does not make the public the owner of the property. The public cannot acquire by *prescription* any land as against the person entitled to it. It can acquire, if at all, a right of *user*, by grant or dedication which may be express or implied from user.² The reason is that the public as such cannot have the particular *animus possidendi* necessary to constitute adverse possession. A contrary view, namely that the Muhammadan community can acquire a title by prescription, has been assumed in the undermentioned case.³ It is submitted that this is not correct.

It follows that there can be no acquisition of title by prescription *against the public*, since the public as such cannot be the owner of any property. But the public may lose its rights of *user* over property where a person has been in adverse possession thereof against the person in whom the ownership is vested for the statutory period. Where a person had made an encroachment upon property vested in a municipality, and was in adverse possession thereof for the statutory period, it was held⁴ that right of the municipality was extinguished, and that the right of the public incidental to its right of way also became extinguished.

100. Special or local law.—Where any special or local law prescribes for any suit for the possession of immovable property a period of limitation different from the period prescribed therefor by the Limitation Act, the period prescribed by the special or local law will apply to the suit and not the period prescribed by the Limitation Act. (See Notes under Section 29, *supra*.)

[See also (1916) A I R 1916 P C 21 (27) 39 Mad 617 · 43 Ind App 192 · 35 Ind Cas 902 (P C), *Secretary of State v. Chellikani Rama Rao*.]

5. (1890) 3 Cal W N 99 (106), *Kristo Moni Gupta v. Secretary of State*.

Note 99a

1. (1904) 27 Mad 386 (393) · 14 Mad L Jour 37, *Madathapu Ramayya v. Secretary of State*. (Per Bhashyam Ayyangar J.)

See also Section 2 of Madras Land Encroachment Act, III of 1905, which is based on the said principle

2. (1923) A I R 1923 Mad 624 (625) · 74 Ind Cas 25 · 47 Mad 116, *Usam Kasim Sait v. Secretary of State*.

(1936) A I R 1936 Oudh 207 (208) 165 Ind Cas 101, *Ramzan v. Md. Ahmad Khan* (User will establish dedication)

3. (1890) 1890 Bom P J 276, *Fatu v. Ramchandra*.

4. (1916) A I R 1916 Mad 613 (614) 17 Ind Cas 158 ; 39 Mad 6, *Rasavesswara-swami v. Bellary Municipal Council*.

(1901) 25 Mad 635 (650) 12 Mad L Jour 37, *Sundaram Ayyar v. Municipal Council, Madura*.

<p>143.* Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.</p>	<p>Twelve years.</p>	<p>When the forfeiture is incurred or the condition is broken.</p>	<p>Article 143</p>
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Forfeiture and breach of condition, distinguished.
4. Forfeiture of tenancy—General.
 5. Forfeiture of tenancy for breach of condition of alienation—Suit against alienee.
 6. Forfeiture of tenancy by denial of landlord's title.
7. Forfeiture in cases other than tenancy.
 8. Forfeiture on remarriage of Hindu widow.
 9. Forfeiture on unchastity of Hindu widow.
 10. Other instances of forfeiture.
11. Onus of proof as to forfeiture.
12. Waiver of forfeiture.
13. Breach of condition imposed by Section 119, Transfer of Property Act.
14. Starting point.

Other Topics

Article not limited to persons committing breach	...	See Note 2, Pts. 5, 6
Article 139 and this Article	...	See Notes 4, 5
Forfeiture by alienation—Date of execution and not date of registration	...	See Note 14, Pt. 3
is starting point	...	See Note 14, Pt. 2
Plaintiff's ignorance or knowledge—Not material for starting point	...	See Note 12, Pt. 3
Successive forfeitures	...	See Note 2, Pts. 2, 3
Suit framed in tort—Article not applicable...	...	See Note 2, Pt. 1
Suit on ground of forfeiture and subsequent determination of tenancy—Article not applicable	...	See Note 4, Pt. 5
T. P. Act, Section III—Cases falling under	...	

1. **Legislative changes.**—A provision corresponding to this Article was first introduced by Article 144 of the Act of 1871. It has been retained in practically the same form in this Article

* Act of 1877, Article 143 and Act of 1871, Article 144

Same as above.

Act of 1859

No corresponding provision.

Article 143
Notes
2—3

2. Scope of the Article. — This Article applies to suits for possession on the ground that the plaintiff is entitled to possession by reason of forfeiture or breach of condition. The forfeiture or the breach of condition, as the case may be, must, *by itself*, give rise to a right to possession. A forfeiture by a tenant in a case governed by Section 111 of the Transfer of Property Act, for example, does not, by itself, entitle the landlord to possession of the property. To entitle him to do so, he must determine the tenancy in the way mentioned in that Section and it is the *determination* of the tenancy and not the forfeiture itself that will enable the landlord to sue for possession. A suit, therefore, by the landlord against the tenant on the ground of forfeiture and subsequent determination of the tenancy will not be governed by this Article.¹

The Article does not apply to a suit framed in *tort*.² Thus, where *A*, a landlord, sued *B*, his tenant, for an injunction directing *B* to fill up a tank excavated by him on the land, for an order that *B* should pay compensation to the plaintiff, and, in default, for ejectment of *B*, it was held that the suit was framed in *tort* and not on any breach of any contract and that Article 32 applied to the case.³ Similarly, a suit under Section 155 of the Bengal Tenancy Act for ejectment of a tenant on the ground of misuse of the land was held governed by Article 32 and not by this Article.⁴

The Article is not limited to suits against the *very persons* who have entailed the forfeiture or committed the breach of condition. It applies to suits against *any person* who is in possession if it is based on forfeiture or breach of condition.⁵ Thus, a suit by a landlord against the alienee from a tenant for possession on the ground that the tenancy was forfeited by the alienation, will be governed by this Article.⁶

The Article will not apply where Section 10 of the Act is applicable, inasmuch as where that Section applies no suit will be barred by any length of time.⁷

3. Forfeiture and breach of condition, distinguished. — A forfeiture imports *neglect or fault* on the part of a person the result

Article 143 — Note 2

1. See Note 4, *infra*.

2. (1899) 26 Cal 564 (568) : 3 Cal W N 464 (F B), *Sharoop Dass Mondal v. Joggessur Roy*.

3. (1899) 26 Cal 564 (568) : 3 Cal W N 464 (F B), *Sharoop Dass Mondal v. Joggessur Roy*.

4. (1916) A I R 1916 Cal 395 (396) : 33 Ind Cas 923, *Taher Mondal v. Tarafdi Gharami*.

5. (1930) A I R 1930 Mad 430 (432) : 124 Ind Cas 273, *Ayyaswamy v. Manarath-rama*.

6. See Note 5, *infra*.

7. (1887) 14 Mad 1 (8), *Sathappayyar v. Periasami*. (Suit for removal of trustee and to re-attach trust properties to trust on the ground that the trustee committed breach of trust.)

of which is to cause him to lose his property or his right.¹ A breach of condition on the part of *A* which entitles *B* to possession of the property of *A* may or may not be the result of a neglect or fault of *A*. Where it is the result of such fault or neglect, the breach of condition really works a forfeiture. There may, however, be cases where a breach of condition may not be due to any fault or neglect of any person but would yet entitle another to possession of property. Thus, Section 119 of the Transfer of Property Act imposes a statutory condition that if either of the parties to an exchange loses any portion of the property received in exchange, he will be entitled to a return of the thing transferred by him in exchange. The happening of this event is a breach of a statutory condition giving rise to a right to possession of property, but it cannot be said that there is any forfeiture of property inasmuch as the party losing the property on breach of the condition is not guilty of any fault or neglect.

Article 143
Notes
3—4

4. Forfeiture of tenancy—General.—A tenancy is forfeited by a breach of an express condition which provides that on breach thereof the lessor may re-enter, or by the lessee being adjudicated bankrupt and the contract of tenancy provides that the lessor may re-enter on the happening of such event, or by denial by the tenant of the landlord's title to the land. But a cause of forfeiture does not *ipso facto* determine the tenancy. Some overt act on the part of the landlord showing his intention to determine the tenancy is necessary before the tenancy is determined.¹

The above principles are of general application and will govern all cases of landlord and tenant, whether coming within the purview of Section 111 (g) of the Transfer of Property Act, 1882 or not. There are, however, two important particulars in which cases governed by Section 111 (g) of the Transfer of Property Act differ from other cases. The first is that the overt act by the landlord showing his intention to determine the lease must, under Section 111 (g) of the Transfer of Property Act, be in the form specified therein, while in other cases it may be in any form.² The other and more important point of difference is that, in cases governed by Section 111 (g) of

Note 3

1. Oxford Dictionary
Wharton's Law Lexicon

Note 4

1. See Section 111 (g) of the Transfer of Property Act.
See Halsbury's Laws of England, 1910 Edn., Vol. 18, Page 530.
(1926) A I R 1926 Cal 193 (203) 85 Ind Cas 678, *Gopala Laman Ray v. Anil Singh*.
(1897) 24 Mad 246 (250) 10 Mad L Jour 415, *Srinivasa Iyer v. Muthuswamy Pillai* (Tenancy subsists until landlord exercises his option to determine the tenancy).
2. Halsbury's Laws of England, 1910 Edn., Vol. 18, Page 531. [Note: Where the Transfer of Property Act Section 111 is not applicable the rules of English law as to forfeiture of tenancy are to be applied as being in consonance with justice, equity and good conscience—See *Maharaja of Jeypore v. Rajwade*, A I R 1919 PC 144. See also A I R 1, 27 Mad 293 (298).]

Article 143
Note 4

the Transfer of Property Act, the forfeiture does not *ipso facto* furnish a cause of action for the landlord to sue the tenant for possession. The tenancy must have determined before the date of suit by the overt act of the landlord specified in the Section.³ It is in fact the *determination* of the tenancy that furnishes the cause of action and not the forfeiture by itself. But in cases not governed by that Section, a forfeiture by the tenant does not furnish, by itself, a cause of action for the landlord to sue the tenant for possession, notwithstanding no overt act has been done before the date of suit, showing an intention to determine the tenancy.⁴ On the cause of forfeiture happening in such cases, the right of action against the tenant comes into existence at once, though the landlord has an option to take advantage of his right or not. The election is not a condition precedent to the right of action and may be manifested by the institution of the suit itself.⁵

Since, as has been seen above, a suit by a landlord against a tenant, in a case governed by Section 111 (g) of the Transfer of Property Act, for possession on the ground that there has been a forfeiture of the tenancy, is based not on the forfeiture itself as furnishing a cause of action but really on the cause of action furnished by the *determination of the tenancy*, this Article has no application. The suit would be governed by Article 139.⁶ If the case is one not falling within Section 111 (g), Transfer of Property Act, the forfeiture itself, as has been seen above, furnishes a cause of action for the landlord to sue the tenant for possession and such a suit would clearly be one governed only by this Article, if the lease has not been determined by the landlord before the date of the suit.^{6a} Where, however, the landlord has, before suit, determined the tenancy by doing an overt act, the suit will be within both Article 143 and Article 139. In such cases Article 139 will, on general principles, prevail over Article 143, the latter being a general Article and the former a special one. Thus, in *Srinivasa Aiyar v. Muthusamy Pillai*,^{6b} a lessee in a case not governed by the Transfer of Property Act denied the landlord's title more than twelve years before the date of suit. The landlord had determined the lease by a notice

3. (1937) A I R 1937 Mad 295 (298) : 172 Ind Cas 690, *Annamalai v. Vaithilinga*.

(1928) 117 Ind Cas 812 (816) (Cal), *Dejoy Chand v. Gurupada Haldar*.

(1920) A I R 1920 Cal 866 (868) : 60 Ind Cas 812, *Motilal v. Chandra Coomarr Sen*.

4. (1937) A I R 1937 Mad 295 (293) : 172 Ind Cas 690, *Annamalai v. Vaithilinga*.

5. (1910) 6 Ind Cas 447 (450) : 84 Mad 161, *Padmanabaya v. Ranga*.

(1937) A I R 1937 Mad 295 (293) : 172 Ind Cas 690, *Annamalai v. Vaithilinga*.

6. See (1937) A I R 1937 Mad 295 (299) : 172 I. C. 690, *Annamalai v. Vaithilinga*.

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within twelve years of the date of suit. It was held that Article 139 applied to the case.

In *Annamalai v. Vauthilinga*,⁷ however, it was observed broadly by Venkataramana Rao, J., that "where forfeiture itself gives rise to an action for possession, at once Article 143 would apply." In the undermentioned cases^{7a} also, Article 143 was applied to cases not governed by the Transfer of Property Act where the tenancy had been determined within twelve years of the suit but the cause of forfeiture had occurred more than twelve years before suit. It is submitted, on the principles discussed above, that the decisions cannot be accepted as correct.

In *Venkatarama Iyer v. Ponnusamy*,⁸ a tenant failed to perform the services and thus committed a breach of a condition of the tenancy. The case was one not falling within Section 111 (g) of the Transfer of Property Act. On the failure of the tenant to perform the services, the landlord gave a notice to the former determining the lease and later on brought a suit in ejectment. It was held that Article 143 applied to the case and further that time ran from the date of the determination of the tenancy by notice. It is submitted that this decision also cannot be accepted as correct. The suit being one by a landlord against his tenant after the determination of the tenancy, Article 139 clearly applies to the case and will prevail over Article 143 which is a general Article. Assuming, however, that Article 143 applies to the case, time will run from the date of forfeiture and not from the date of determination of the tenancy. The view taken in that case that no forfeiture takes place at all until the determination of the tenancy is not correct.⁹

5. Forfeiture of tenancy for breach of condition of alienation—Suit against alienee. — *B* is a tenant of *A* and one of the conditions of the tenancy is that if *B* alienates the tenancy, *A* would be entitled to re-enter on the land. *B* does alienate the land in breach of the condition and *A* sues the alienee for possession. What is the Article applicable to the case? The answer will depend largely on the question whether the case is one governed by Section 111 of the Transfer of Property Act or not.

If the case is one governed by that Section, then, as has been seen in Note 4 *ante*, the only cause of action for the landlord will be

7 (1937) A I R 1937 Mad 295 (299) 172 Ind Cas 600

7a (1907) 11 Cal W N 661 (662-663) *Geechi Sheikh v. H. Mathewson* (Purporting to follow 7 South W R 209 and 15 Mad 123)

(1926) A I R 1926 Cal 193 (203) 85 Ind Cas 678, *Gopika Raman Day v. Aral Singh*

8 (1935) A I R 1935 Mad 918 (918, 919) 163 Ind Cas 86.

9 (1937) A I R 1937 Mad 295 (295) 172 Ind Cas 600 *Annamalai v. Vauthilinga*

[See also Sec. 112, Transfer of Property Act, which says that a forfeiture is waived by certain acts if the lessor provided he was aware that a forfeiture has been incurred.—If determination of the lease by the landlord doing some overt act is necessary for effecting forfeiture, there is no necessity for the proviso referred to above.]

Article 143
Notes
5-6

the determination of the tenancy, and not the forfeiture by itself, whether the suit is against the lessee or his alienee. This Article will not therefore apply to suits based on such cause of action. Nor will Article 139 apply inasmuch as the suit is not one by the landlord *against the tenant*. It is conceived that Article 144 would apply to such cases. In *Motilal v. Chandra Kumar*,^{1a} the landlord sued the alienee from his tenant for possession on the ground that the tenant forfeited his tenancy by reason of the alienation in breach of the conditions of the tenancy. It was held that Article 143 applied to the case and that the suit was barred. It was further held that the suit itself did not lie inasmuch as the tenancy, which was one governed by Section 111 (g) of the Transfer of Property Act, had not been determined before suit. It is submitted that the observation as to the applicability of Article 143 to the case is not correct. If, as was held, the tenancy had not been determined and no suit would, in cases governed by the Transfer of Property Act, lie against the tenant except on the determination of the tenancy, it follows that no suit will lie even against the alienee on the basis of the alienation in breach of the condition

If the case is not one governed by Section 111 of the Transfer of Property Act, the forfeiture itself will give a cause of action against the alienee and the suit would consequently clearly fall within this Article.¹ The question whether the tenancy was determined by an overt act before suit does not affect the applicability of the Article to such cases

6. Forfeiture of tenancy by denial of landlord's title.— It is only in the case of a tenancy that there can be a forfeiture by denial of the landlord's title. In order to constitute such a forfeiture, the denial must be unequivocal and clear, and to the knowledge of the landlord.¹ In *Maharajah of Jeypore v. Rukmani*,² their Lordships of the Privy Council, after stating that Section 111 (g) of the Transfer of Property Act, 1882, was in substance, the placing, in a statutory form, the rules of English law^{2a} which had been applied by Indian Courts as being in consonance with justice, equity and good conscience, observed as follows:

Note 5

1a (1920) A I R 1920 Cal 866 (867) : 60 Ind Cas 312.

1. (1937) A I R 1937 Mad 295 (293, 299, 300) : 172 Ind Cas 690, *Annamalai v. Vaithilinga*.

Note 6

1. (1921) 71 Ind Cas 270 (271) : 41 Mad L Jour 525 (527), *Sreedharam Vaha Rajah v. Parakkat*.

2 (1919) A I R 1919 P C 1 (4) : 42 Mad 599 : 46 Ind App 102 : 50 Ind Cas 631 (P C)

2a. See also (1901) 21 Mad 246 (250) : 10 Mad L Jour 415, *Srinivasa Iyer v. Muthusamy Pillai*.

(1902) 26 Mad 157 (160) : 12 Mad L Jour 190, *Parameswari v. Vallappa Shanbhaja*.

(1915) A I R 1915 Mad 919 (919), *Venkatarama v. Ponnusami*.

"Now the rule of English law is that a tenant will forfeit his holding if he denies his landlord's title in clear, unmistakable terms, whether by matter of record, or by certain matters in *pais*. The qualification that the denial must be in clear, unmistakable terms has not unfrequently been applied by the Courts in India, which have held that where a tenant admits that he does hold as tenant of the person who claims to be his landlord, *but disputes the terms of the tenancy* and sets up terms more favourable to himself, he does not, though he fails in establishing a more favourable tenancy, so far deny the landlord's title as to work a forfeiture."

A forfeiture by denial of the landlord's title must have occurred before the suit is instituted.³ Denial in the suit itself will not work a forfeiture of which advantage can be taken in that suit.⁴

Where there is no relationship of landlord and tenant between the parties, there can be no question of any forfeiture by denial of the landlord's title. Where, therefore, in a suit a plea of forfeiture by denial of title and limitation is raised but it is found that there was no relationship of landlord and tenant at all between the parties, the suit cannot be considered to be based on forfeiture and consequently this Article cannot have any application. This is the view on which the decisions in *Bhairab Chandra v. Kadam Beva*⁵ and *Abinash Chandra Ghosh v. Narhari*⁶ must be considered to have been based. The observations in those cases that Article 143 does not apply when the relationship of landlord and tenant does not exist, cannot be understood as meaning that the Article applies only to cases between landlord and tenant, a view which is obviously opposed to the wording of the Article. In *Jadu Nath Guha v. Kasiswar Guha*,⁷ Mitter, J., considered the two cases above mentioned and observed as follows:

"In both the cases cited the suit was brought on the footing that there was a tenancy and the same had been forfeited. It was held that Article 143 was not applicable as there was, at no time, any relationship of landlord and tenant. *If that was so, there was, or could be, no question of forfeiture.*"

7. Forfeiture in cases other than tenancy. — It has been seen in Note 4 *ante* that a tenancy can be forfeited in certain cases

3 (1919) A I R 1919 P C 1 (4) 42 Mad 589 46 Ind App 109 50 Ind Cas 631 (P C), *Maharajah of Jeypore v. Eshwari Pattamahadevi*

(1921) 71 Ind Cas 270 (271) 41 Mad L Jour 525 (527), *Sreedram Velha Rajah v. Parakkat*.

4 (1919) A I R 1919 P C 1 (4) 42 Mad 589 46 Ind App 109 50 Ind Cas 631 (P C), *Maharajah of Jeypore v. Eshwari Pattamahadevi*

5, (1914) 22 Ind Cas 28 (29, 30) (Cal)

6 (1930) A I R 1930 Cal 165 (167) 37 Cal 250 123 Ind Cas 444

7 (1933) A I R 1933 Cal 779 (783) 160 Ind Cas 250

Article 143
Notes
7—9

But interests owned by persons other than tenants can also be forfeited by rules of law or by reason of express conditions, positive or negative.¹ See Notes 8 to 10 below.

This Article is in general terms and applies to all suits for possession by reason of *any* forfeiture or breach of condition.²

8. Forfeiture on remarriage of Hindu widow.—A Hindu widow forfeits, under the Hindu Widows' Remarriage Act (Act XV of 1856), the estate inherited by her from her husband, if she remarries. The question has arisen whether, in such a case, the reversioner entitled to the property is bound to sue within twelve years of the date of forfeiture as provided by this Article, or whether he may sue within twelve years of the death of the widow as provided by Article 141. In *Nathu v. Mt. Nai Bahu*,¹ it was held by the Judicial Commissioner's Court of Nagpur that Article 143 applied to such cases. It was also observed that if Article 141 was to be applied, the remarriage must be taken to be the widow's civil death so that the starting point under that Article also would be the date of remarriage. In *Tilottama Dasi v. Madhu Sudan Giri*,² the High Court of Calcutta doubted the correctness of both the views expressed in the Nagpur case but did not decide the question as it came to the conclusion that there was, in fact, no valid remarriage on the facts of that case. In *Md. Azim v. Md. Saadat Ali*,³ the Chief Court of Oudh applied Article 143 to such a case.

9. Forfeiture on unchastity of Hindu widow.—An award provided that *A* was to be in possession of certain property for her life, that *B* was to get the same after *A*'s death, but that if *A* became unchaste, *B* would be entitled to take possession of the properties at once. *A* became unchaste. *B* sued for possession within twelve years of *A*'s death but beyond twelve years of the date of her unchastity. It was assumed by the High Court of Allahabad that this Article would have applied if the forfeiture had not been waived by the plaintiff. It was, however, held that the forfeiture was waived and that, consequently, the suit was not governed by this Article but by Article 141.¹

Note 7

1. (1935) A I R 1935 Cal 779 (782) : 160 Ind Cas 250, *Jadu Nath Guha v. Kasiswar Guha*.
2. (1935) A I R 1935 Cal 779 (782) : 160 Ind Cas 250, *Jadu Nath Guha v. Kasiswar Guha*.

Note 8

1. (1915) A I R 1915 Nag 57 (57) : 29 Ind Cas 612 : 11 Nag L R 86.
2. (1928) A I R 1928 Cal 714 (715) : 117 Ind Cas 703.
3. (1931) A I R 1931 Oudh 177 (223) : 136 Ind Cas 642. (Case of Muhammadan widow but Hindu law was applicable under the Oudh Estates Act of 1869)

Note 9

1. (1937) A I R 1937 All 268 (270) : I L R (1937) All 424 : 169 Ind Cas 586, *Rashik Lal v. Mt. Radha Dhulanya*.

10. Other instances of forfeiture.—*A* made a gift to *B* on condition that *B* should maintain and render certain services to *A* and that *A* would be entitled to re-enter on the gifted property on breach of the condition. *B* failed to maintain *A* and render the services and *A* sued *B* for possession. It was held by the High Court of Lahore that this Article applied to the case.¹

Article 143
Notes
10—11

A, B, C and *D* partitioned their properties and there was a clause in the deed of partition that if any one of the co-sharers purchased the raiyati or under-raiyati holding situate within the allotment of any of the other co-sharers, such other co-sharer would be entitled to take *khas* possession of the property purchased. *B* purchased the raiyati holding situate within the allotment of *A*, and *A* thereupon sued for possession. It was held by the High Court of Calcutta that this Article applied to the case and that time ran from the date of the purchase.²

A sold a certain property to *B* who, as part of the contract of purchase, agreed to pay *A* certain fees annually in default of which *A* was to be entitled to the possession of a certain portion of the land sold. *B* failed to pay the dues and *A* sued for possession. It was held that the suit was governed by this Article.³

See also the undermentioned cases.⁴

11. Onus of proof as to forfeiture.—It is for the party who sets up forfeiture to prove it. Where a penalty of forfeiture is sought to be enforced, it cannot be presumed or inferred, when the deed between the parties is silent on the point.¹ In *Bibi Sahodra v. Rai Jang Bahadur*,² where *A*, and *B* a Hindu widow, entered into a compromise under which they were to enjoy a certain property during the lifetime of *B*, that *B* should not alienate her interest and that *A* was to get the property after *B*'s death, their Lordships of the Privy Council observed as follows

Note 10

- 1 (1932) Ind Rul 1932 Lah 645 (646), *Budhu v. Hanjro*
2. (1935) A I R 1935 Cal 779 (782) 160 Ind Cas 250, *Jadu Nath Guha v. Kanisakar Guha*
- 3 (1882) 4 All 493 (496) 1882 All W N 125, *Dhraj v. Gulshan Ali*
4. (1883) 1883 Pun Re No 180, *Dhyan Singh v. Mehan Singh* (Wajib-ul-arz providing for forfeiture if resident of village leaves the village.—Suit for possession based on such forfeiture is governed by Article 143.)
- (1920) A I R 1920 Cal 682 (682) 59 Ind Cas 308 *Kali Kant v. Lajpati Kant*. (*A* made a will bequeathing a house to *B* for life with remainder to *C* with condition added that *B* should not leave the house and if he did so, *C* would be entitled to possession at once.—On *B*'s leaving the house, *C* sued for possession within twelve years of *B*'s death but more than twelve years after he left the house.—Held that suit was barred as forfeiture took place more than twelve years before suit.)

Note 11

1. (1867) 7 Sush W R 209 (210), *Tumec v. Iben Ch. & they v. Meer Suckar Khan*
- 2 (1881) 8 Cal 224 (229) 5 Ind App 210 4 Sush 224 1 Ind 308 (1881)

Article 143
Notes
11—12

"There are no words of forfeiture and it would be a very strong thing and a very unusual thing to import a forfeiture when the parties have not provided for one, and where there is no rule of law attaching forfeiture to a particular act."

Where a grant is made with a condition of performance of service attached, the mere fact of non-performance of the service is not sufficient in all cases to show that the land granted is forfeited to the grantor.³ Where a grant was made by *A* to *B* on condition of *B* performing certain services, namely, attendance on certain ceremonial occasions, it was held by their Lordships of the Privy Council that the refusal to render these services did not operate to create a forfeiture or give occasion for resumption.⁴ Where, in a lease, there was a condition against alienation by the tenant, but there was no provision for re-entry on breach of the condition, it was held that the mere breach of the condition did not operate as a forfeiture.⁵

12. Waiver of forfeiture.—Where a cause of forfeiture arises in favour of a particular person, that person can, as a general rule, waive the forfeiture.¹ The effect of the waiver is to wipe off or bar the right of action which arises in his favour on the forfeiture.² He can, however, where there is a fresh cause of forfeiture, take advantage of it and bring his action for relief on the basis of such forfeiture.³

In order to constitute waiver there must be some *positive act* on the part of the person in whose favour the cause of forfeiture has arisen. A mere lying by or mere inaction is not waiver.⁴

An award provided that *A* was to be in possession of certain properties for her life, that *B* was to get the same after *A*'s death but that if *A* became unchaste, *B* would be entitled to take possession of the properties at once. *A* became unchaste but *B* did not take any steps to get possession of the properties. He however sued for possession within twelve years of *A*'s death but beyond twelve years of the

3 (1914) A I R 1914 Cal 4 (20) : 21 Ind Cas 481 (F B), *Dhagwat v. Sheo Pershad*.

4 (1919) A I R 1919 P C 1 (5) : 42 Mad 589 : 46 Ind App 109 : 50 Ind Cas 631 (P C), *Maharajah of Jeypore v. Rukmani Pattamahaderi*.

5. (1902) 26 Mad 157 (161) : 12 Mad L Jour 169, *Parameshwari v. Vittalappa Shanbhaga*.

Note 12

1. See cases cited in Foot-Note (3).

2. (1937) A I R 1937 Mad 295 (298) : 172 Ind Cas 690, *Annamalai v. Vauthilinga*.

3. (1916) A I R 1916 Lah 403 (401) : 35 Ind Cas 235, *Locha Ram v. Jinduradda Khan*.

(1922) A I R 1922 Mad 290 (295) : 55 Ind Cas 880, *Zamotin Raja Atergal, Calicut v. Samu Nair*.

(1937) A I R 1937 Mad 295 (298) : 172 Ind Cas 690, *Annamalai v. Vauthilinga*.

4. See Note 11 to Article 75, ante.

See also Halsbury's Laws of England, Vol. 18, page 537.

[See also (1929) A I R 1929 Sind 140 (144) : 116 Ind Cas 581, *Nenomal v. Chandumal*

(1897) 1597 Pun Re No. 28, *Achhar Mal v. Hukman*.]

unchastity of *A*. It was held that *B* waived the forfeiture by not exercising his option to take advantage of the forfeiture.⁵ It is submitted that this view is not correct. The case was one of *mere inaction* on the part of *B* and this will not, as has been seen already, amount to a waiver. In the undermentioned case⁶ it was doubted whether a forfeiture on the remarriage of a Hindu widow could be waived by the reversioner entitled to the property

Article 143
Notes
12—14

13. Breach of condition imposed by Section 119, Transfer of Property Act.—Where *A* and *B* exchange properties, but *A* is subsequently deprived of the property got by him in exchange, and thereafter *A* sues *B* for possession under Section 119, Transfer of Property Act, the suit would be governed by Article 143 as one for possession on breach of a statutory condition.¹

Section 119, Transfer of Property Act, however, provides that on the deprivation of any portion of the property exchanged, the *whole* transaction of exchange is nullified and the party deprived may get back the *whole* of the property given by him in exchange. Where *A* and *B* entered into a contract whereby they exchanged their properties with the condition that if either lost any portion of the property he would be entitled to get back an *equal portion* out of the property exchanged, and *A*, on so losing a portion, sued *B* for an equivalent portion out of the property exchanged, it was held that the suit was not one based on a statutory condition under Section 119 of the Transfer of Property Act but was merely one for specific performance of a contract governed by Article 113.²

In *Srinivasa Iyengar v. Kottapakki Johnsa Rowther*,³ where there was a contract of the same nature as is specified in Section 119 of the Transfer of Property Act, it was held that such contract was in the nature of a *condition subsequent* and that a suit based thereon was governed by Article 143.

14. Starting point.—The starting point under this Article is the time when the forfeiture is incurred or the condition is broken.¹ The

5 (1937) A I R 1937 All 268 (270) : 169 Ind Cas 586 . I L R (1937) All 424, *Rashik Lal v. Mt. Radha Dhulaya*

6 (1928) A I R 1928 Cal 714 (715) : 117 Ind Cas 703, *Sm. Tilotama Das v. Madhu Sudan*.

Note 13

1. (1907) 30 Mad 316 (317, 318) : 17 Mad L Jour 149, *Rajagopalan v. Somasundara Thambiran*.

2. (1899) 9 Mad L Jour 187 (188), *Vettra Pillai v. Poornambala Pillai*.

3. (1920) A I R 1920 Mad 812 (812) : 42 Mad 690 : 51 Ind Cas 939.

Note 14

1. See (1935) A I R 1935 Bom 98 (100) : 156 Ind Cas 333, *Daluchand v. Shanti*. (Obiter : It was held that there was no breach of condition at all—It was observed, however, that if Article 143 applied, time ran from the date of the breach of condition)

Article 143 date on which plaintiff acquires *knowledge* of the acts which would
Note 14 : occasion the forfeiture or constitute the breach of the condition is not the starting point.²

Where a forfeiture takes place by reason of an alienation by a tenant, it is the date of the *execution* of the document and not the date of the *registration* thereof that is the starting point; the registration dates back to the date of execution.³

A sold certain property to *B* who agreed, as part of the contract of sale, to pay *A* certain fees annually in default of which *A* was to be entitled to the possession of a certain portion of the property sold. *B* failed to pay the dues and *A* sued for possession. It was held that the breach of condition occasioning the forfeiture was not a continuing one within the meaning of Section 23 of the Act and that time would, under this Article, run from the date when *B* first failed to pay the fees.⁴

<p>Article 144</p>	<p>144.* For possession of immoveable property or any interest therein not hereby otherwise specially provided for.</p>	<p>Twelve years.</p>	<p>When the possession of the defendant becomes adverse to the plaintiff.</p>
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The Commentary on Article 144 is given under Article 142, *ante*.

* Act of 1877, Article 144

Same as above.

Act of 1871, Article 145

Columns 1 and 2—Same as above.

Column 3 ran as follows "When the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff."

Act of 1859, Section 1, clause 12

Limitation of twelve years. Suits for immoveable property.

To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies—The period of twelve years from the time the cause of action arose.

2 (1916) A I R 1916 Lah 101 (103) . 36 Ind Cas 565, *Locha Ram v. Jindwadda Khan*.

(1922) A I R 1922 Mad 290 (295) : 55 Ind Cas 380, *Zamotin Raja Acergal, Calicut v. Samu Nair*.

(1930) A I R 1930 Mad 490 (432) . 121 Ind Cas 273, *Ayyanmy v. Manarikkrama*.

[See also (1916) A I R 1916 Lah 403 (403, 404) 35 Ind Cas 235, *Locha Ram v. Jindwadda Khan*.]

3. (1936) A I R 1936 Lah 391 (400) . 17 Lah 403 : 166 Ind Cas 157, *Dhuman Khan v. Gurumukh Singh*

4. (1952) 4 All 493 (496) : 18-2 All W N 125, *Dhrajraj v. Gulshan Ali*.

PART IX — *Thirty years.*

145.* Against a de- positary or pawnee to recover moveable pro- perty deposited or pawned.	Thirty years.	The date of the deposit or pawn.
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Article 145

Synopsis

1. Legislative changes.
2. "Moveable property."
3. "Deposit" and "depository," meaning of.
4. Articles 49 and 145.
5. Suit against heirs of depository or pawnee.
6. Starting point.
7. Nature of suit must be ascertained from the plaint.

Other Topics

Deposit of Government Securities	...	See Note 2, Pt 12
Deposit of money	...	See Note 2, Pts 2 to 11, Note 3, Pt 10
Mere demand and refusal will not take case out of this Article	...	See Note 4, Pts 5, 6
Suit for redemption of pledge...	...	See Note 7, Pt. 2

1. *Legislative changes.*

Before the Act of 1859, there was no limitation provided for a suit against a depository or pawnee. Such a suit was not barred by any length of time.¹

*	Act of 1877
	Same as above.
	Act of 1871

PART IX — *Thirty years*

147 — Against a depository or pawnee to recover moveable property deposited or pawned	Thirty years.	The date of the deposit or pawn, unless where an acknowledgment of the title of the depositor or pawnor, or of his right of redemption has before the expiration of the prescribed period been made in writing, signed by the depository, or pawnee, or some person claiming under him, and in such case, the date of the acknowledgment
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Act of 1859, Section 1, clause 15

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claiming under him, from the date of such acknowledgment in writing

Article 145 — Note 1

1. (1868) 1868 Pun Ro No. 2, *Mt. Dayawunttee v Bhai Nundjpal*.

Article 145
Notes
1—2

The Act of 1859 provided in clause 15 of Section 1 a limitation of thirty years for a suit against a depositary or pawnee of moveable property, or a mortgagee of immovable property, the starting point being *the date of the deposit or pawn or mortgage*.

Article 147 of the Act of 1871 repeated the provisions of clause 15 of Section 1 of the Act of 1859 so far as *deposits and pawns* were concerned and Article 148 repeated its provisions so far as *mortgages* were concerned.

In the case of a mortgage, the Act of 1877 altered the law by providing a period of sixty years from the time when the right to redeem or the right to recover possession accrued, thus making the starting point coincide with the accruer of the cause of action.²

Article 145 of the Act of 1877 was a re-enactment of Article 147 of the Act of 1871, the provision as to acknowledgment, however, being omitted from the third column, as a general provision as to extension of the period of limitation by an acknowledgment was made in Section 19 of that Act.

The present Article simply re-enacts Article 145 of the Act 15 of 1877.

2. "Moveable property."—There is a difference of opinion as to whether the words "moveable property" as used in this Article include money or other things which are intended to be consumed in the using and are capable of being estimated by number, weight or measure, and replaced by, such as, corn, wine, or money: in other words, whether the words "moveable property" would include the subject-matter of a contract of *mutuum* in Roman Law, that is, a contract of loan of something which is not to be returned *in specie*, but which is to be replaced by something similar and equivalent.¹ According to the High Court of Bombay,² and the general trend of opinion of the High Court of Calcutta,³ the words "moveable property" in this Article would include money or other things capable

2. (1919) A I R 1919 Mad 972 (985) . 40 Mad 1010 : 43 Ind Cas 31 (F B), *Seets Kutti v. Kunhi Pathumma* (Per Srinivasa Iyengar, J.)

Note 2

1. Halsbury's Laws of England, Vol. 1, pages 540, 511.
2. (1876) 1876 Bom P J 179, *Vinayak v. Sadashiv*.
3. (1920) A I R 1920 Cal 167 (168) : 55 Ind Cas 515, *Nanda Lal Doss v. Ashutosh*.
 (1907) 6 Cal L Jour 535 (537, 538), *Gobind Prasad v. Patna Municipality*.
 (Per Holmwood, J.—A return of current coin is a return *in specie*.)
 (1885) 12 Cal 113 (115), *Upendralal Mukhopadhyay v. Collector of Rajshahye*.
 (1904) 31 Cal 519 (523) : 8 Cal W N 500, *Administrator General of Bengal v. Sm. Kristokamini Dassee*.
 (1916) A I R 1916 Cal 669 (870) : 34 Ind Cas 959, *Ganghari Chakravarty v. Nabin Chandra*.
 (1870) 14 Suth W R 491 (493) : 5 Beng L R 463, *Gour Narayan Mazumdar v. Prayanath Kundu*. (Assumed)
 (1869) 11 Suth W R 491 (492) : 3 Beng L R App 57, *Gobind Chunder Sein v. Collector of Dacca*. (Do)
 [But see (1876) 25 Suth W R 415 (415), *Radha Nath Doss v. Dama Churn Mookenjee*.
 (1870) 14 Suth W R 322 (322), *Shumboo Chunder Mullick v. Pran Krisho Mullick*.]

of being replaced. In *Administrator General of Bengal v. Sm. Kristo Kamini Dassee*,⁴ K made over certain Government Promissory Note Securities to I to be kept by him in deposit and, if necessary, to be used by him for raising funds, and I was to draw the interest accruing on the securities from time to time and pay the same to K, and in case I had occasion to pledge or sell the securities he was to redeem or replace the same on being required to do so by K. It was held by Maclean, C J, and Stevens, J, that I was the "depository" within the meaning of this Article, notwithstanding that the securities may not be returnable *in specie*, if they were returnable as securities, though replaced. Mr Justice Hill who was also one of the Judges constituting the Bench, dissenting from the above view, observed as follows :

**Article 145
Note 2**

"An essential characteristic of a deposit properly so called is, that the thing deposited should not be used by the depositee and his liability is to return *in specie* the very thing deposited, when his right to retain it has determined, the general property in the subject-matter of deposit remaining meanwhile in the depositor. It appears to me further that, although the loan was of the kind generically described as a loan for use, it fell under that particular species of gratuitous bailments, to which the term *mutuum* has been applied and of which the distinguishing characteristics are that the property in the subject of the bailment passes to the borrower, and that he satisfies the obligation cast upon him by the contract, if he restores, not the actual thing lent, but some other thing of the same kind "

In *Lala Gobind Prasad v. Chairman of Patna Municipality*,⁵ Mr Justice Mookerji observed that the Legislature used the word "specific" before the words "moveable property" whenever property was referred to, which was recoverable *in specie*, that this Article did not use the word "specific" before the words "moveable property" but that the words "moveable property" were held by the Privy Council in *Asghar Ali v. Kurshedali*,⁶ in a case arising under Article 89 of the Act, to include money, and that therefore the words "moveable property" in this Article must be held to include also money.

On the other hand, the High Courts of Allahabad,⁷ Madras⁸ and

4. (1904) 31 Cal 519 (528) 8 Cal W N 500

5 (1907) 6 Cal L Jour 535 (539)

6 (1902) 24 All 27 (43) 29 Ind App 227 3 Bom L R 576 8 Sar 142 (P C)

7. (1894) 16 All 256 (258) 1894 All W N 73, *Jasoda Bibi v. Parmanand*
[See also (1919) A I R 1919 All 102 (103) 41 All 643 35 Ind Cas 45,
Kalyan Mal v. Kishen Chand]

8. (1914) A I R 1914 Mad 4 (6) 22 Ind Cas 60 *Bala Krishnudu v. Narayanaswamy* (Confirming A I R 1914 Mad 51)

(1915) A I R 1915 Mad 717 (719) 25 Ind Cas 812 *Srinivasa Aiyangar v. Rangaswami Aiyangar*

(1918) A I R 1918 Mad 728 (730) 42 Ind Cas 519 *Goundasamy Iyer v. Municipal Council, Kumbakonam*

[But see (1889) 6 Mad 351 (352) *Sir J. F. Davis v. Anantharamaiah*]

Article 145
Notes
2—3

Lahore⁹ have held that the words "moveable property" in this Article do not include money. In *Balakrishnudu v. Narayanaswamy*,¹⁰ Sir Arnold White, C. J., stated the reasons why the expression "moveable property" cannot be construed so as to include money, as follows :

"The very fact that the period of limitation is so long goes some way to indicate, to my mind, that the Legislature intended that the transaction to which so unusually a long period of limitation is applicable should not be the sort of transaction which is of every day occurrence—the lending of money and an agreement to pay on demand or on a specific date. . . . I would only add one other reason and that is that the words are "against a depositary or pawnee to recover moveable property deposited or pawned." The word 'pawnee' which occurs in conjunction with the word 'depositary' seems to be wholly inappropriate to the case of money."

It is submitted that the Madras view is correct on principle.

Where the *specific coins* handed over are to be returned, they would be 'moveable property' within the meaning of this Article.¹¹

Government Securities¹² and a right to *malikana*¹³ are also moveable property, but not a right of *brit fujmanka*,¹⁴ or land, or other immovable property.¹⁵

3. "Deposit" and "depositary," meaning of. — A deposit of moveable property is a particular form of bailment of goods.¹

9. (1919) A I R 1919 Lah 322 (323) : 47 Ind Cas 592 : 1919 Pun Re No. 4, *Dalipa v. Labhu Ram*.
 (1882) 1882 Pun Re No. 74, *Ganesh Lal v. Chunnalal*.
 (1936) A I R 1936 Lah 629 (635) : 165 Ind Cas 723 : 17 Lah 737, *Municipal Committee, Amritsar v. Ralia Ram*. (Quere.)
10. (1914) A I R 1914 Mad 4 (6) : 22 Ind Cas 60.
11. (1919) A I R 1919 All 102 (103) : 41 All 643 : 55 Ind Cas 45, *Kalyan Mal v. Kishen Chand*.
 (1919) A I R 1919 Lah 322 (323) : 47 Ind Cas 592 : 1919 Pun Re No. 4, *Dalipa v. Labhu Ram*.
 (1882) 1882 Pun Re No. 74, *Ganesh Lal v. Chunnalal*.
 (1894) 16 All 256 (258) : 1894 All W N 73, *Jasoda Bibi v. Parmanand*.
12. (1938) A I R 1938 P C 110 (112) : 173 Ind Cas 612 : 32 Sind L R 426, *Id. Habibul Haq v. Seth Tikam Chand*.
 (1901) 31 Cal 519 (528) : 8 Cal W N 500, *Administrator General of Bengal v. Kristo Kamini Dassee*. (On appeal from 7 Cal W N 476.)
 (1934) A I R 1934 Cal 87 (91, 92) : 61 Cal 119 : 150 Ind Cas 398, *Bibhu Bhusan v. Anadi Nath*
13. (1865) 2 Sath W R 163 (163), *J. Lyons v. Taj Chunder Shikeresur Roy*.
14. (1883) 10 Cal 73 (74) : 13 Cal L R 263 : 8 Ind Jur 197, *Raghoo Pandey v. Kasy Parecu*. (Under Hindu law it is immovable property.)
15. (1867) 4 Bom H C R A C 155 (160, 162), *Radhabai v. Shama*.
 (1970) 2 N W F H C R 43 (43), *Doerjun v. Chaina*.

Note 3

1. (1921) A I R 1921 Cal 416 (418) : 69 I. C. 900, *Promoth Nath v. Prosymno*.
 (1910) 5 Ind Cas 1 (3) : 83 Mad 56, *Gangneni Kondiah v. Kondappa Naidu*.

In *Coggs v. Bernard*,^{1a} Lord Holt stated the law of England as regards bailments very much as it is to be found in the Digest and Institutes of Justinian using, with slight variations, the terms there given to describe the different kinds of bailments. He divided bailments into six classes :—

- (a) *Depositum* . — The deposit of a chattel with the bailee, who is simply to keep it for the bailor without reward or recompense.
- (b) *Mandatum* — Where the bailee has, without reward, to do something for the bailor or with the chattel bailed.
- (c) *Commodatum* — Where the bailor, without recompense, lends a chattel to the bailee for him to use.
- (d) *Pignus* : — Sometimes called *Vadium* or pawn, where the bailee holds the chattel confided to him as a security for a loan or debt, or the fulfilment of an obligation.
- (e) *Locatio rei* — Where the goods are lent to the bailee to be used by him for hire.
- (f) *Locatio operis faciendi* — Where goods are delivered to be carried or something is to be done about them for a reward to be paid to the bailee.

A deposit of chattel in English law means the *depositum* in the Roman law, i. e., the first of the six classes above mentioned, namely, a bailment of a chattel to be kept for the bailor and returned upon demand without recompense.^{1b} There is a difference of opinion whether the word "deposit" in this Article means the same thing as the *depositum* in Roman law or has a wider meaning so as to include other classes of bailment also. In the undermentioned cases,² the High Court of Calcutta took the view that the word "deposit" in the Article is used in accordance with the old use of the word *depositum*. In later cases, however, the same Court has taken the view that the word has been used in the Article in a wider sense than that of *depositum*. In *Gangahari Chakravarti v. Nabin Chandra*,³ where one P made over certain ornaments to B, a goldsmith, to be melted and made into new ornaments, it was held in a suit by P to recover the gold or its price that Article 145 applied so far as the first of the alternative prayers was concerned. It may be noted that the transaction was in the nature of a *locatio operis faciendi*, the sixth class of bailment mentioned in the English case of *Coggs v. Bernard*^{1a} above

1a. 93 E R 107 (109) : 1 Sm L C (11th Edn) 173 : 2 L D Raym 909.

1b. Halsbury's Laws of England, Vol. 1, page 526

See also Wharton's Law Lexicon : "Deposit".

2. (1889) 16 Cal 25 (29), *Ishur Chunder v. Jibun Kumars*.

(1891) 18 Cal 231 (241), *Secretary of State v. Fazel Ali*. (Overruled on another point by 20 Cal 51)

(1870) 14 Suth W R 322 (322), *Shumboo Chunder v. Pran Kru's*.

3. (1916) A I R 1916 Cal 869 (870) : 34 Ind Cas 959.

Article 145
Note 3

referred to. In *Bibhu Bhushan v. Anadi Nath*,⁴ where the transaction was in the nature of a *commodatum*, or loan of chattel for use of the bailee without reward, it was held that a suit for recovery of the property was governed by Article 145, on the ground that the word "deposit" has been used in the Article in the simple sense that when one man's property was handed by that man to another, the latter became a depositary of it.

The decisions of the Madras High Court also are conflicting. In *Narayanaswamy v. Aiyasamy*,⁵ where *A* gave *B* twenty loose rubies in order that *B* might give them to a goldsmith and have them made into a jewel and on the failure of *B* to do so, *A* sued him for the rubies or their value, it was held by Mr. Justice Sadasiva Iyer that the transaction was a *mandatum* and not a deposit in the legal sense as the moveable property bailed was not itself to be returned in the condition in which it would naturally remain at the time of the return, (along with any natural accretions, if any such accretions happened to be added) but the defendant promised to have some work performed in connexion with the rubies and to deliver a jewel into which the said rubies had to be worked. In *Balakrishnudu v. Narayanaswamy Chetty*,⁶ it was held by Wallis, J., that the word "deposit" in the Article must be taken to mean the sort of bailment known to lawyers under that name in the Roman law of bailments which was accepted by Bracton and afterwards by Lord Holt in *Coggs v. Bernard*.⁷ He further observed as follows :

"This *depositum* is a bailment of a specific thing to be kept for the bailor and returned when wanted as opposed to *commodatum* where a specific thing as a horse or a watch is lent to the bailee to be used by him and then returned ; and both are contrasted with *mutuum* where corn, wine, or money or other things are given to be used and other things of the same nature and quality are to be returned instead. In my opinion there is no ground for holding that in the Acts of 1859 and 1871 the word 'deposit' in the Sections and Articles already referred to included so-called deposits of money or other things which were not intended to be kept but to be used, and there is nothing in the Acts of 1877 and 1908 to show that any different construction should now be put on Articles 133 and 145.

"The framers of these Acts were lawyers and must be taken to have used the term deposit in the ordinary legal sense. This conclusion is not, I think, in any way affected by the fact that in 1877 the Legislature introduced a new Article 60 which speaks of "money deposited under an agreement that it shall be payable on demand," thus using the word "deposit" not in its legal but in its popular sense."

4. (1934) A I R 1934 Cal 87 (91) 61 Cal 119 : 150 Ind Cas 399.

5. (1913) 18 Ind Cas 921 (921) (Mad).

6. (1914) A I R 1914 Mad 51 (53) 37 Mad 175 : 24 Ind Cas 852.

7. 92 E R 107 (111) : 1 Sm L C (11th Edn) 173 : 2 L D Raym 909.

The decision of Wallis, J., was affirmed on appeal in *Balakrishnudu v. Narayanaswamy Chetty*,⁸ and Sir Arnold White, C. J., entirely concurred in the reasons stated by Wallis, J. A contrary view has, however, been taken in *Krishtappa Chetty v. Lakshmi Ammal*,⁹ namely, that the word 'deposit' in the Article has not been used in the limited sense of *depositum* but in a wider sense as including a *commodatum*, i. e., a bailment for the use of the bailee. Schwabe, C. J., observed that the Legislature meant to use simple and plain language and in using the words "deposit" and "depository" they meant simply to say that when one man's property was handed by that man to another, he became a depository of it unless there was something in the terms of the handing over which would prevent his being treated as a person with whom it was deposited at all. "It is almost impossible," observed his Lordship further, "that, when they were making a period of thirty years applicable to cases of goods handed over either for safe custody or in pledge, they should have intentionally made a shorter period for cases of goods handed over for the advantage of the person to whom they were handed. It would be most illogical to allow a shorter period in the case when the "depositee," if I may use the word, gets the advantage than is allowed in the case where the depositee is merely doing something for the advantage of the depositor, and it is to be observed that cases not coming under Article 145 come nowhere, unless indeed they can be brought within the words of Article 49."

In the undermentioned case,¹⁰ in which the question was whether a deposit of money was covered by this Article, the High Court of Lahore held that a deposit of money was not within this Article and rested its decision on the view expressed by Wallis, J., in *Balakrishnudu v. Narayanaswamy Chetty*.¹¹ In *Gurbakhsh Singh v. Kharait Ram*,¹² which was a case of a bailment of jewels for use by the defendant at a wedding without recompense, the same High Court held that this Article applied on the ground that the fact that the defendant was "allowed to use the same did not take the transaction out of the category of deposits as that expression is used in Article 145."

The Chief Court of Oudh has adopted the same view as that of Wallis, J., in *Balakrishnudu's case*¹¹ and has held that a bailment in the nature of a *commodatum* is not within Article 145.¹³

It is submitted that the view expressed by Wallis, J., in *Balakrishnudu's case*¹⁴ referred to above is correct on principle. Clause 15

8. (1914) A I R 1914 Mad 4 (6) 22 Ind Cas 60.

9. (1923) A I R 1923 Mad 578 (580) 72 Ind Cas 642.

10. (1919) A I R 1919 Lah 322 (323) 47 Ind Cas 592. 1919 Pan Re No 4, *Dalip Singh v. Labh Singh*.

11. (1914) A I R 1914 Mad 51 (53, 54) 37 Mad 175 24 Ind Cas 652.

12. (1930) A I R 1930 Lah 913 (914) 129 Ind Cas 199.

13. (1930) A I R 1930 Oudh 395 (396, 397) 126 Ind Cas 682. 6 Luck 80, *Chaturgun v. Shakti Singh*.

14. (1914) A I R 1914 Mad 51 (53, 54) 37 Mad 175 24 Ind Cas 652, *Balakrishnudu v. Narayanaswamy*.

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of Section 1 of the Act of 1859 used practically the same words as those that have been used in this Article, and it had been held in cases arising under that Act that the clause should be construed with reference to the law of limitation in England¹⁵ and that the word "deposit" in the clause referred to the "depositum" of the Roman law and not to *commodatum* or any other form of bailment.¹⁶ The Legislature in enacting Article 147 in 1871 (corresponding to this Article) must have been aware of the earlier decisions and would have used different language than that used in clause 15 of Section 1 of the Act of 1859 if a wider meaning was considered necessary to be given to the word "deposit." Again, the word "deposit," with reference to deposit of chattel, has a definite and settled meaning in English law, and where the same word is used by the Indian Legislature, it must be understood in the same sense unless there is any indication to the contrary

In execution of a decree, certain moveable property was attached under the provisions of Order 21 Rules 44 and 45 of the Civil Procedure Code and put into the custody of a *sapurdar*. *X* objected to the attachment and the Court upholding the objection, ordered the *sapurdar* to return the property to the objector. It was held that the order created the relationship of depositor and depositary between the objector and the *sapurdar* and that a suit by *X* for recovery of the property from the *sapurdar* was governed by this Article.¹⁷

A entrusted a jewel to *B* to procure a loan for *A*. *B* pledged the jewel and obtained the loan. After the loan was paid off, *B* got back the jewel and retained possession of it. On *B*'s refusal to return the jewel to *A*, the latter sued *B* for recovery thereof. It was held that as there was no agreement that after the repayment of the loan the jewel was to remain in deposit with *B*, the suit was not governed by Article 145 but was governed by Article 49.¹⁸

4. Articles 49 and 145.—It follows from the discussion in Note 2 *ante* that the words "moveable property" in this Article mean, with reference to the context, moveable property recoverable *in specie*, in other words, *specific* moveable property. Article 49 *ante* provides a period of three years for suits for "other specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same." It is a general Article applicable to suits for recovery of specific moveable property and this Article is a special Article providing for suits for recovery of specific moveable property *deposited or pawned*.¹ Where therefore this Article as well as Article 49

15. (1867) 4 Bom H C R A C 155 (162), *Radhabai v. Shama*.

16. (1870) 14 Suth W R 322 (322), *Shumboo Chunder v. Pran Krsto*.

17. (1924) A I R 1924 Nag 12 (13) 75 Ind Cas 787, *Laxmichand v. Dulichand*.

18. (1911) 12 Ind Cas 207 (208) 35 Mad 696, *Gopalsamy Iyer v. Subramanaya Sastra*.

Note 4

1. (1921) A I R 1921 Cal 416 (418), 69 Ind Cas 900, *Promoth Nath v. Prodymno Kumar*.

cover a particular case, the former will prevail over the latter in accordance with the general principle of interpretation of statutes that a special provision will prevail over the general.²

A somewhat different view has been expressed in *Krishtappa Chetty v. Lakshmi Ammal*,³ that Article 49 is not dealing with articles deposited in any sense at all and that therefore there is no question of that Article applying to cases falling under this Article. In *Md. Habib-ul-Haq v. Tikam Chand*,⁴ where Government Promissory Notes were left by A with B and it appeared that they must have been so left either as security for the loan borrowed by A from B or for safe custody, it was held by their Lordships of the Privy Council that in either case a suit by A against B for recovery thereof would be governed by Article 145 and not by Article 49.

Where this Article applies to a case, the mere fact that a demand has been made for the property and has been refused, would not take the case out of the applicability of this Article and bring it within Article 49.⁵ The contrary view expressed in the undermentioned cases⁶ is against the general trend of opinion and does not seem to be correct.

5. Suit against heirs of depositary or pawnee.—In *Promoth Nath Mallick v. Prodyumno Kumar Mullick*,¹ Mr. Justice C. C. Ghose observed that bailments are of two kinds, voluntary and involuntary, that where A makes a deposit with B, B is a voluntary bailee, that if B dies, his heir is an involuntary bailee who may also be described as a “depositary” and that a suit against the heir would

(1910) 5 Ind Cas 1 (1) 33 Mad 56, *Gangineni Kondiah v. Kondappa Naidu*
(1928) A I R 1928 Rang 309 (310) 116 Ind Cas 468 6 Rang 517, *Ma Shue On v. Ma Saw*

2 (1902) 26 Bom 430 (432) 4 Bom L R 72, *Narmadabai v. Bhatanishankar*

3 (1923) A I R 1923 Mad 578 (579, 580) 72 Ind Cas 842

4 (1938) A I R 1938 P C 110 (112) 173 Ind Cas 612 32 Sind L R 426

5 (1916) A I R 1916 Cal 869 (870) 34 Ind Cas 959, *Gangahari Chakrabarti v. Nabin Chandra*

(1921) A I R 1921 Cal 416 (418) 69 Ind Cas 900, *Promoth Nath v. Prodyumno Kumar*

(1929) A I R 1929 Cal 143 (144) 107 Ind Cas 473, *Ajneswar Karmarkar v. Kailash Chandra*

(1934) A I R 1934 Cal 87 (90, 91) 61 Cal 119 150 Ind Cas 392, *Bibhu Bhushan v. Anadi Nath*

[See also (1895) 1895 Bom P J 213, *Ganapatram Hira Chand v. Parbhudas Narsidas*

(1902) 26 Bom 430 (432) 4 Bom L R 72, *Narmadabai v. Bhatanishankar*

(1910) 5 Ind Cas 1 (2) 33 Mad 56, *Gangineni Kondiah v. Kondappa Naidu*

(1928) A I R 1928 Rang 309 (310) 116 Ind Cas 468 6 Rang 517, *Ma Shue on v. Ma Saw*]

6 (1899) 9 Mad L Jour 51 (56), *Tamukrishna Reddi v. Panaya Gounjan*

(1919) A I R 1919 All 102 (103) 41 All 643 55 Ind Cas 45 *Kalyan Mal v. Kushen Chand*

Note 5

1 (1921) A I R 1921 Cal 416 (419) 69 Ind Cas 900

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therefore be governed by this Article. In *Bibhu Bhushan Dutta v. Anadi Nath Dutt*,² a Bench of the Calcutta High Court dissented from the view expressed in *Promothnath's case*¹ that the heir of a deceased bailee is an involuntary bailee, but came to the conclusion that a suit against the heir would nevertheless be governed by Article 145. It was observed that by the death of the bailee the bailment comes to an end (Section 162 of the Contract Act), but that the character of the transaction, in so far as it is a deposit is not altered, and that the person in whose hands the thing deposited comes, if it does by virtue of his succeeding to the estate of the original depositary, becomes a depositary all the same for the purposes of this Article. The High Court of Madras has held that in the case of a depositary or pawnee it cannot be said that the contract of deposit or pawn comes to an end on the death of the depositary or pawnee and that therefore this Article will apply to a suit against the legal representative of the depositary or pawnee.³ Section 162 of the Contract Act was not referred to

See also the undermentioned case⁴ where the Article has been applied to suits against the legal representatives of the original depositary or pawnee.

6. Starting point.—Time, under this Article, runs from the date of the deposit or pawn and the period of limitation is thirty years from that date.^{1a} And this is so, notwithstanding a contract between the parties fixing a time before which the depositor or pawnor could not recover the property from the bailee.¹ The principle appears to be the same as in the case of loans of money where time runs from the date of the loan even though the loan is stated to be payable on demand. See Note 6 to Article 59 ante. Domat, in his Civil Law, states the reason of the rule as follows:

"A deposit is a covenant by which one person gives to another something to keep which he is to restore whenever the depositor shall think fit to call for it. The deposit ought to be gratuitous, for otherwise it would be a hiring and the letting to hire where the depositary would let out his care. . . . Since it is the nature of the deposit that the things are not deposited for the behoof of the depositary, as things lent are for the use of the borrower, but for the bare advantage of the depositor he may

2. (1931) A I R 1931 Cal 87 (92) : 61 Cal 119 : 150 Ind Cas 893.

3. (1925) A I R 1925 Mad 185 (185) : 84 Ind Cas 1026, *Krishnaswami Iyengar v. Gopalachariar*.

4. (1930) A I R 1930 Lah 913 (914) : 129 Ind Cas 190, *Gurbakhsh Singh v. Kharant Ram*.

Note 6

1a (1872) 1872 Pun Re No. 23, *Gyan Chand v. Mohumda*.

1. (1919) A I R 1919 Mad 972 (985) : 40 Mad 1040 : 43 Ind Cas 31 (F B), *Secti Kutti v. Kunhi Pathumma*.

(1910) 5 Ind Cas 1 (2, 3) : 33 Mad 56, *Gangineni Kondiah v. Kondappa Naidu*

take back the thing deposited *whenever he pleases, even although the time of restitution were regulated by contract.*"²

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The reason why such a long period of thirty years has been fixed for suits for recovery of deposits and pawns, has been stated by Doyle, J., of the Rangoon High Court, as follows:

"It is significant that Section 10 of the Limitation Act does not allow limitation to be set up at all by a trustee in the case of an express trust. It is only reasonable therefore to suppose in cases like the above where there is a transaction in the nature of a trust that the law would contemplate a longer period of limitation against a wrongdoer than in cases where no trust of any kind had been established."³

7. Nature of suit must be ascertained from the plaint.—

Where the plaintiff alleges in his plaint that he made a deposit with the defendant of moveable property, and the defendant's statement is a mere denial of the plaintiff's allegations, and no evidence is adduced, it is the plaintiff's allegation and averment in the plaint that should be looked to as the sole basis for considering what period of limitation is applicable to the case, and not any case that may be set up in defence.¹

A suit for redemption of a pledge is a suit to "recover moveable property pawned" within the meaning of this Article.²

146. Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged.

Thirty years.

When any part of the principal or interest was last paid on account of the mortgage-debt.

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* Act of 1877

Same as above

Act of 1871

First and third columns Same as above

Second column "Sixty years"

2. Domet's Civil Law, ss. 691, 692, 697, cited in 5 Ind Cas 1 (at pp 2 and 3).

3. (1925) A I R 1925 Rang 309 (310). 6 Rang 547 116 Ind Cas 403, *Ma Shaw On v. Ma Saw*

Note 7

1 (1925) A I R 1925 Mad 155 (155) 84 Ind Cas 1026, *Krishna Murthy Iyer v. Gopalachariar*.

2 (1900) 15 Bom 30 (32), *Kashiram Mulchand v. Hirabai Surstani*.

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Notes

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Synopsis

1. Legislative changes.
2. Scope and applicability of the Article.
3. Starting point of limitation.
4. Applicability of Sections 20 and 21 to suits for possession.

Other Topics

Article 135 and this Article	...	...	See Note 2
No payment made—Starting point of limitation	...	...	See Note 3, Pt. 4
Payment by whom to be made	...	...	See Note 3, Pt. 3 & F-N (3)

1. Legislative changes.—There was no corresponding provision to this Article in Act 14 of 1859, and suits for possession by a mortgagee were governed by Section 1 clause 12 of that Act, which prescribed a period of *twelve years* from the time the cause of action arose. By virtue of Section 6 of that Act, it was provided that with regard to suits “in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immovable property mortgaged, the *cause of action* shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage-debt.”

Article 149 of Act 9 of 1871, corresponding to this Article, prescribed a period of *sixty years*. The sixty years’ period was reduced to thirty years under Article 147 of Act 15 of 1877, the language of which was similar to this Article.

2. Scope and applicability of the Article.—This Article deals with suits for possession by a mortgagee before a *Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction*. Article 135 *supra*, deals with such suits in Courts not established by Royal Charter. Unlike Article 135, this Article is restricted to suits for recovery of *possession from the mortgagor*.¹

3. Starting point of limitation.—The starting point of limitation under this Article is the date when any part of the principal or interest was last paid on account of the mortgage-debt, and *not the date of payment* fixed in the mortgage deed or the date of default in making payment.¹ Referring to this exceptional provision in the

Act of 1859, Section 1 clause 12 and Section 6.

Limitation of twelve years Suits for immovable property

To suits for the recovery of immovable property or of any interest in immovable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose.

Computation of period of limitation in suits in Supreme Courts by mortgagee to recover immovable property mortgaged.

6 In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immovable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt.

Article 146 — Note 2

1. See (1886) 12 Cal 614 (618, 619), *Shunmoyee Das v. Srinath Das*.

Note 3

1. (1897) 14 Cal 464 (482) . 11 Ind Jur 414, *Lutchmiput Singh v. Land Mortgage Bank of India Ltd*

corresponding Section 6 of Act 14 of 1859, their Lordships of the Judicial Committee observed as follows :

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"It may, however, have been deemed necessary to introduce the exception stated above, in order to put mortgages in the English form, when put in suit in the Supreme Court which was generally governed by English law, upon the same footing as that in which English mortgages are under the existing Statutes of Limitation, and their Lordships dealing with suits upon mortgages in the ordinary Courts in India, might, in the simple case of a mortgagee and his mortgagor permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession, and that a new cause of action and right of entry accrued when that permission ceased."²

The third column speaks of payment of interest or principal on account of the mortgage debt but does not specify as to who should make the payment. In *Lewin v Wilson*,³ the Judicial Committee in construing Section 30 of Capita 84 of the Consolidated Statutes of New Brunswick, the language of which was similar to this Article with regard to the starting point of limitation, observed as follows

"The principle . . . established by authority is, that the only person by whom a payment can be made to stay the currency of the Statute, is the mortgagor, or some person in privity of estate with him,

2. (1871) 16 Suth W R P C 83 (31, 35) 14 Moo Ind App 144 8 Beng L R 104
2 Suther 480 2 Sir 711 (P C), *Drojonath Koondoo Choudhry v Khelut Chunder Ghose*

3. (1886) 11 App Cas 639 (646, 647) 55 L J P C 75 55 L T 410

See also the following English cases

- (1881-82) 30 W R (Eng) 327 (329) 51 L J Ch 394 10 Ch D 539 46 L T 356, *Harlock v Ishberry* (Payment of rent by tenant of the mortgagor to the mortgagee is not payment of interest or principal for the mortgage)

- (1885-86) 31 W R (Eng) 690 (691) 55 L J Ch 789 14 App Cas 423 61 L T 814, *Newbould v Smith* (Payment of interest by mortgagor after he had parted with equity of redemption held insufficient to keep alive the mortgage)

- (1864) 145 R R 79 (84, 85) 11 H L C 115 10 Jur (NS) 855 11 L T (NS) 69 13 W R 20 4 N R 520, *Chinnery v Evans* (A payment by a receiver appointed at the instance of the mortgagee over several mortgaged estates was held to be sufficient though in point of fact the receiver had only been in possession of one of those estates)

- (1888-89) 37 W R (Eng) Dig Cyl 111 (112) *Birding v Owen* (Held, payment of interest to the administrator of mortgagee's estate prevents the running of limitation)

- (1889-90) 38 W R (Eng) 65 (66) 53 L J Ch 94 43 Ch D 106 61 L T 632, *In re Frisby, Allison v Frisby* (Payment by surety)

- (1879-80) 29 W R (Eng) 904 (907) *Heath v Pugh* (Held after the institution of suit for foreclosure time ceased to run against the mortgage-plaintiffs and the effect of the decree for foreclosure was to give the plaintiffs an indefeasible right to possession)

- (1894-95) 43 W R (Eng) 327 (328) 1 Ch 213 64 L J Ch 184 71 L T 755 13 R 75, *Kibble v Fairthorne*

- (1897-98) 46 W R (Eng) 56 (59) 66 L J Q B 705 (1897) L R 2 Q B 143 77 L T 88, *Thornton v France*

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or the agent of one of them. It will have been seen that their Lordships think it necessary to qualify that doctrine." Their Lordships eventually held that. "In this case their Lordships think it sufficient to say that payments made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender of money for the defeasance or redemption of the mortgage, are payments which by Section 30 give a new starting point for the lapse of time"

The third column of this Article assumes or presupposes a payment for interest or principal on account of the mortgage-debt. But supposing there is no such payment at all, when does limitation start in a suit for possession by the mortgagee? The High Court of Bombay⁴ characterized the language used by the Legislature in the third column as being "very awkward and defective." In the case cited below,⁵ Garth, C J., observed :

"If it were necessary for us in this case to put a construction upon that Article, I should be much disposed to hold that it is applicable to those cases only where some part of the principal or interest has been paid, and that in other cases the ordinary twelve years' limitation would apply. In cases where any part-payment could be proved, the presumption that would arise from lapse of time (which is the principle upon which all Limitation Acts are founded) would not arise, or at any rate it would not be nearly so strong as in a case where no part-payment had been made. And this might in some degree explain the extraordinary length of time which is allowed to a mortgagee under Article 149."

In the same case, Markby, J., pointed out :

"This would seem as if the clause only applied to transactions where something had been paid, principal or interest; and there may be a good reason for this, for where some part of the principal and interest has been paid, there is not likely to be any dispute as to the original transaction, of which the payment operates as an acknowledgment."

4. Applicability of Sections 20 and 21 to suits for possession.

—Sections 20 and 21 of the Act apply only to suits for recovery of debts, and not to suits for recovery of possession. See Note 4 to Section 20 *ante*, and also the undermentioned case.¹

4 (1877) 3 Bom 312 (330, 332), *Ganpat Pandurang v. Adary, Dadabhai* (Suit for foreclosure—Held, whether Article 132 or Article 149 of Act 9 of 1871 applied, the suit having been filed within twelve years from date of mortgage is not barred)

5. (1879) 4 Cal 283 (296, 303) 3 Cal L R 336, *Ram Chunder Ghosal v. Jugut Monmohiney Dabee*

Note 4

1. (1903) 25 All 167 (170, 171) . 1903 All W N 223, *Anwar Husain v. Lalmir Khan*.

<p>146A.* By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.</p>	<p>Thirty years.</p>	<p>The date of the dispossession or discontinuance.</p>	<p>Article 146 A</p>
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "By or on behalf of any local authority."
4. "Public street or road."
5. "Dispossessed or of which it has discontinued the possession."
6. Effect of bar of suit by expiry of period prescribed by this Article.

Other Topics

Applicability of Article—Essentials	See Note 2
Suit barred by limitation—Whether local authority can proceed under Municipal statute	See Note 6, Pts 3 to 6
Suit by or on behalf of Local Government—Article not applicable	See Note 3, Pt 2
Suit by private person—Article not applicable	See Note 3, Pt 1
Suit for possession of Crown lands entrusted to local authority—Article not applicable	See Note 4, Pt 7

1. Legislative changes.—This Article was first introduced in the Act of 1877 by Act XI of 1900. Prior thereto, suits contemplated by this Article were held governed by the twelve years' period of limitation.¹

2. Scope of the Article.—This Article applies to suits by or on behalf of any local authority for the possession of a public street or road from which it has been dispossessed or of which it has discontinued the possession. In order therefore that this Article may apply, it is necessary that —

- 1 The suit must be by or on behalf of any local authority.
See Note 3 below

* Act of 1877

Same is alive

Note — This Article was added to the Act of 1877 by Act XI of 1900

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1 (1916) A I R 1916 Mad (13 (114)) 17 Ind Cas 178 (110) 35 Mad C. Cases—
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2. It must be one for possession.
3. The subject-matter of the suit must be a public street or road or any part thereof. See Note 4 below.
4. The local authority must have been dispossessed of such street or road or must have discontinued possession thereof. See Note 5 below.

3. "By or on behalf of any local authority."—This Article applies only to suits by or on behalf of any local authority. It does not apply to a suit for ejectment by a *private person* against another in respect of a specified field, although the field has been recorded as part of a thoroughfare and *shamlat-i-deh*.¹ Nor does it apply to suits by or on behalf of the Local Government. In *Basaveswaraswami v. Bellary Municipal Council*,² where a suit was filed against the Municipality as well as the Local Government for a declaration of ownership regarding a *pial* put up over a drain, it was held that although the plaintiff had established title by prescription as against the Municipality by reason of his possession for over thirty years, inasmuch as the drain over which the *pial* was put up originally belonged to the Government, the plaintiff had acquired no title by prescription against the Government because he had not been in possession for sixty years.

4. "Public street or road." — A "road" is a general term meaning a way or a passage.¹ A public road is a road which the public has a right to use. A "street" is a town or village road that has houses on one side or both of it,² and a public street is a street which the public has a right to use.

The word "road" is not confined to the portion actually used by the public, but extends also to side lands which are kept as parts of the road for the purposes of the road though they may not be actually used by the public. A too narrow construction cannot be put upon the expression "public street or road" in this Article, as it is intended to safeguard the interests of public bodies which are not expected to be as vigilant over their rights as private individuals.³

"Street" includes the drains or ditches on either side thereof.⁴

Note 3

1. (1912) 15 Ind Cas 285 (286); 1912 Pun Re No. 124, *Achar Singh v. Badhawa Singh* (Held, Article 120 applies.)
2. (1916) A I R 1916 Mad 613 (615, 617) 39 Mad 6 · 17 Ind Cas 158.

Note 4

1. Wharton's Law Lexicon.
2. Concise Oxford Dictionary.
3. (1928) A I R 1923 Cal 485 (487) 112 Ind Cas 24, *Anukul Chandra v. Dacca District Board*.
[See also (1890) 17 Cal 684 (685), *Ram Chandra Ghose v. Bally Municipality* ("Road" in cl 5 of S. 217 of Bengal Act III of 1884 is not limited to roads vested in the Municipal Commissioners but include paths over which the public have a right of way)]

- 4 See the definition of "Public Street" in Section 3 of the Madras District Municipalities Act, 5 of 1920.

As to what is sufficient evidence to establish that a road is a public road, see the undermentioned cases.⁵

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The Article applies only to suits for the possession of any *public street or road*. It does not apply to suits for possession of *other property*.⁶ Thus, it does not apply to a suit for possession of *Crown lands* entrusted to the local authority for management.⁷ But the Article is not restricted to suits for possession of streets or roads formed by the local authority on lands *belonging to or acquired by it in proprietary right*. In *Sundaram Iyer v. Municipal Council of Madura*,⁸ Mr. Justice Bhashyam Iyengar observed as follows.

"I do not think that the new Article (146 A) can be reasonably restricted to streets or roads formed by the Municipality on lands belonging to or acquired by it in proprietary right. The operation of Section 28 of the Limitation Act (XV of 1877) upon this new Article will be to extinguish the right of highway on the expiration of thirty years from the date of dispossession of the Municipality by encroachment and thus free the land from the burden of the highway, if the person encroaching upon the highway be the owner of the land. If the owner of the land on which the highway exists be a third party, an encroachment of a permanent character on the public highway will also, as a general rule, operate as occupation of the soil and dispossession of the owner of the soil equally with the Municipality, and his ownership will be extinguished in favour of the trespasser at the expiration of the ordinary period of limitation, *i.e.*, 12 years, and at the expiration of 30 years the ownership thus acquired by the wrongdoer will be freed from the burden of the highway. But, if the highway has been dedicated to the public by the Crown, the right of the Crown as owner of the land can be extinguished only at the expiration of sixty years' adverse possession or occupation by the trespasser."

5. "Dispossessed or of which it has discontinued the possession." — See Notes to Article 142, *ante*

[But see (1904) 28 Mad 17 (18) 1 Weir 916, *Venkatarama Chetty v. Emperor* (A case decided under Madras Act III of 1880—Not correct law in view of the definition in Section 3 of the present Act V of 1920)]

5 (1880) 6 Cal L R 282 (284), *Anderson v. Juggodumba Dab*

Escot

Nadan v. Aggarwal (Evidence necessary to constitute a highway discussed)

(1898) 1898 Pun Re No 62, *Rana Ganpat Singh v. Kangra Valley State Company* (Principles of English law, how far applicable to Indian highways discussed)

6. See (1930) A I R 1930 Mad (79 (181) 123 Ind Cas 545, *Secretary of State v. District Board of Tanjore*

7 (1934) A I R 1934 Lah 900 (261) 133 Ind Cas 964, *Labha Singh v. Municipal Committee, Amritsar*.

8. (1902) 25 Mad 635 (650) 12 Mad L Jour 37.

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5—6

In *Arunachalla v. Municipal Council of Mayavaram*,¹ where the question arose as to whether the plaintiff had dispossessed the Municipality of the drains on the sides of a public street and acquired an indefeasible right as against it, the High Court of Madras observed as follows :

"The plaintiffs can acquire adverse title against the Municipality only if they did any acts by which the Municipality were prevented from enjoying the drains as drains. The Municipality's possession and enjoyment consisted principally in the water of the street falling into and being carried off by the drains unless the enjoyment of the drain by the Municipality as a drain is prevented, there could be no adverse possession. The mere fact that the Municipality did not repair the drains or that the plaintiffs have been repairing or looking after the drains cannot prevent the enjoyment by the Municipality of the drains as drains so long as they are carrying off the street rain water and hence no adverse possession has been established."

6. Effect of bar of suit by expiry of period prescribed by this Article.—The streets in municipal towns are vested in the Municipalities by Government for purposes for which they were constituted. The right of the Municipality over the street is not a mere right of easement; the street itself as well as the soil thereof is vested in the Municipality in trust for the public. The Municipality cannot give up the rights of the public in the street or affect their rights by any act of their own, but this will not affect the capacity of a person in hostile possession to acquire rights which would affect the public. Thus, where the owner of a house abutting a street constructs a *pial* over a portion of the street and is in hostile possession for a period of more than thirty years, a suit by the Municipality for possession of the space covered by the *pial* would be barred under this Article, and by the operation of Section 28 *ante*, the rights of the Municipality to such space will be extinguished in favour of the trespasser.¹ Similarly, where a person built a *rowak* or *platform* upon a portion of a street vested in the Municipality and was using it as an integral part of his building for over fifty years before suit, it was held that the right of the Municipality to that portion of the street or drain which was occupied by the wall of the *rowak* was extinguished. It was also pointed out that the erection of the *rowak* was not a continuing wrong as contemplated by Section 23 of the Act but that the injury was complete on the erection of the *rowak*.²

Note 5

1. (1920) A I R 1920 Mad 193 (194) : 55 Ind Cas 493.

Note 6

1. (1895) 19 Mad 151 (157), *Municipal Commissioners, Madras v. Sarangapani Mudaliar*.
2. (1919) A I R 1919 Cal 807 (808) : 49 Ind Cas 93, *Ashutosh Sadhukhan v. Corporation of Calcutta*.

Under various local Acts, e.g., the Bombay District Municipal Act, 1901 (Section 122) and the Madras District Municipalities Act, 1920 (Section 182), the local authority is authorized to remove encroachments made by persons on public streets and roads. There is a difference of opinion as to whether, after a suit for possession of a public street or road is barred by limitation under this Article, the local authority can remove the encroachments under the power given to it by the statute. According to the High Court of Bombay, the local authority cannot remove the encroachment, as the encroached portion ceased, after the expiry of the period prescribed by this Article, to be a public street or road.³ The High Courts of Madras⁴ and Lahore⁵ and the Judicial Commissioner's Court of Sind⁶ have, on the other hand, held that the right of the local authority to remove the encroachment is not affected by the fact that the title of the local authority to the space occupied by the encroachment might have been extinguished by the bar under this Article.

Article 146 A
Note 6

PART X—Sixty years.

147. By a mortgagee for foreclosure or sale.	Sixty years.	When the money secured by the mortgage becomes due.
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Article 147

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Act of 1877

Same as above.

Acts of 1871 and 1859

See Note 1 "History and . . ." above Clause 12, Section 1 of the Act of 1859 provided .

To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose.

3 (1922) A I R 1922 Bom 111 (112) 64 Ind Cas 202 . 46 Bom 335, *Abaji Ragho v. Municipality of Jalgaon*

(1920) A I R 1920 Bom 9 (9, 10) 53 Ind Cas 326, *Tayabali 'Abdullahai v. Dohat Municipality*

66 (1922) A I R 1922 Bom 100 (100) 50 Ind Cas 913, *Ahmeda-*

4 (1916) 161) 33 Mad 6.

(1925) A I R 1925 Mad 64 (65, 66) 47 Mad 716 81 Ind Cas 894 25 Cri L Jour 1070, *Public Prosecutor v Varadarajulu Naidu* (Distinguishing 20 Ind Cas 956)

5. (1936) A I R 1936 Lah 182 (182) 159 Ind Cas 639, *Municipal Committee, Amritsar v. Mt Gujra* (A I R 1922 Bom 111, Not followed, and A I R 1925 Mad 64, Followed)

6. (1935) A I R 1935 Sind 222 (222) 1935 Cri Cas 1253 37 Cri L Jour 52 159 Ind Cas 247, *Durlabji Hanwaj v. Municipal Corporation Karachi* (Case under Section 195 of Karachi City Municipal Act, 1933)

(See however (1915) A I R 1915 Sind 4 (7) 50 Ind Cas 13 9 Sind L R 1, *Karachi Municipality v. Shamoo Laddha* (Held as plaintiff has acquired a prescriptive title the land is his private property and S 122 (2) of the Municipal Act does not help the Municipality))

Article 147
Note 1

Synopsis

1. History and scope of the Article.
2. Applicability of Article to mortgages by deposit of title deeds.
3. "Mortgagee."
4. Starting point.

Other Topics

Anomalous mortgage	...	See Note 1, Pt. 14 & F-N (6)
Article confined to suits for foreclosure or sale in the alternative	...	See Note 1
...	...	Pt. 11, Note 3,
Article 132 and this Article	...	See Notes 1, 4
English mortgages—Applicability of Article after amendment of T. P. Act,	...	...
Section 67	...	See Note 1, Pt. 14
Mortgage by conditional sale	...	See Note 1, Pt. 2 and F-N (2), (6)
Usufructuary mortgage	...	See Note 1, F-N (6)

1. History and scope of the Article. — There was no provision corresponding to this Article in the Act of 1859 and a suit to enforce a mortgage, whether simple,¹ or by conditional sale,² or by deposit of title deeds,³ was held to be one for the recovery of an interest in immovable property governed by the twelve years' rule in clause 12 of Section 1 of that Act.

The Act of 1871 introduced Article 132 providing for suits "for money charged upon immoveable property." There was no provision corresponding to this Article. It was held in cases arising under that Act that a suit to recover money in enforcement of a mortgage or charge was governed by Article 132.⁴ It was even held in some cases that a suit for a mere *personal* decree for money charged upon

Article 147—Note 1

1. (1875) 1 Cal 163 (167) : 25 Suth W R 84 : 3 Ind App 1 : 3 Suther 222 : 3 Sar 581 (P C), *Juneshwar Dass v. Mahabeer Singh*.
 (1868) 9 Suth W R 170 (174) : Beng L R Sup Vol 879, *Surwan Hossein v. Shahajadah Gulam Muhammad*.
 (1866) 10 Suth W R 379 (379) : 9 Beng L R 175n, *Munoo Lall v. T. W. Pique*.
 (1864) 2 Mad H C R 51 (54), *Chettis Goundan v. Sundaram Pillai*.
 " " " " *Tachapa Sanyasi*.
 " " " " *Mutlammal*.
 " " " " *Isuamy v. Basireddy Konda-*
2. (1885) 12 Cal 614 (616, 619, 620) : 10 Ind Jur 458, *Shurnomoyee Das v. Shrinath Das* (Mortgages in English form between Hindus in the mofussil of Bengal were held to be enforceable only as mortgages by conditional sale).
 (1878) 4 Cal 283 (302) : 3 Cal L R 336 : 2 Sbone L R 2, *Ram Chunder Ghosal v. Juggutmonmohiney Dabee*.
 (1888) 11 All 144 (147) : 1889 All W N 41, *Murlidhar v. Kanchan Singh*.
 3. (1868) 10 Suth W R 56 (57), *Pearce Mohun Bose v. Gobind Chunder Addy*.
 4. (1884) 7 All 502 (506) : 12 Ind App 12 : 9 Ind Jur 160 : 4 Sar 619 (P C), *Ram Din v. Kalka Prasad*.
 (1877) 3 Bom 312 (332), *Ganpat Pandurang v. Adarji Dadabhai*.

immovable property would be governed by Article 132 of that Act, as it was a suit literally for "money charged upon immoveable property."⁵

The Act of 1877 introduced a slight modification in Article 132 by the substitution of the words "to enforce payment of money charged upon immoveable property" for the words "for money charged upon immoveable property" which occurred before. It also introduced a new provision corresponding to the present Article 147 providing a period of sixty years for suits "by a mortgagee for foreclosure or sale." The introduction of this Article gave rise to a considerable conflict of opinion. According to one series of decisions, this Article applied to suits for sale or for foreclosure in respect of *mortgages* and Article 132 applied to suits in respect of *charges* not amounting to mortgages.⁶ It was further held in some cases that a suit for a *mere personal decree* for money charged on immovable property would also be governed by Article 132 notwithstanding the change introduced in that Article.⁷ According to another series of decisions, this Article applied only to cases where the mortgagee sued for *sale or foreclosure in the alternative* and Article 132 would apply to all other suits to enforce a mortgage or a charge.⁸ The leading case expressing this view was the decision of the Calcutta High Court in

5. (1882) 6 Bom 719 (723) (F B), *Lallubhai v. Naran*.

6. See cases cited in Foot-Note 3 to Note 2 to Article 132, *ante*

(See also (1895) 17 All 493 (495) 1895 All W N 110, *Ram Balan v. Lalla Prasad*.)

(1907) 29 All 544 (552, 553) 1907 All W N 159 . 4 All L Jour 424, *Ram Singh v. Sobha Ram*. (Suit based on pious obligation of sons and grandsons.)

(1888) 1888 All W N 200 (200), *Radho v. Umar Daras Khan*

(1886) 1886 All W N 212 (213), *Jugal Kishore v. Ram Sahai*. (Anomalous mortgage—Simple usufructuary mortgage.)

(1886) 10 Bom 592 (593), *Gobind Bhattachand v. Kalnah*

(1884) 1884 Bom P J 29, *Mahabateshwarbhat v. Ratnabai*

(1891) 1891 Bom P J 16, *Firm known as Nanji v. Pandu*

(1891) 1891 Bom P J 35, *Daraji Niraja v. Taty Jayapa*.

(1900) 27 Cal 185 (186, 187), *Aman Ali v. Azgar Ali Mia*. (Barred after twelve years.)

(1893) 18 Mad 64 (65, 66) 2 Mad L Jour 155, *Ammanna v. Gurumurtha*. (Mortgage by conditional sale—Suit for foreclosure.)

(1896) 19 Mad 411 (414) 6 Mad L Jour 210, *Udayana Pillai v. Senthil Pillai*. (Usufructuary mortgage containing covenant to pay.)

(1906) 16 Mad L Jour 53 (54), *Chairman, Municipal Council, Rajahmundry v. Venkateswarlu*

(1885) 1885 Pun Re No 19, *Gujar Mal v. Haich Ram*

(1888) 1888 Pun Re No 115, *Karim Balhsh v. Mt Amar Devi*]

Isildatrar

Achru Mal

The above cases are no longer law

[See (1885) 7 All 502 (506) 12 Ind App 12 4 Ser 619 (P C), *Ram Din v. Kalla Prasad*]

8 See the cases cited in Foot Note 4 to Note 2 to Article 132, *ante*

[See also (1890) 1890 Pun Re No 112 (F B), *Pari Saren Dass v. Mehtab*.]

Article 147
Note 1

Girwar Singh v. Thakur Narain Singh,⁹ where it was observed that the object of introducing Article 147 was to provide for cases where reliefs of foreclosure or sale in the alternative could be claimed and for which there was some uncertainty felt before as to the provision applicable. A third view was expressed in some cases that, with regard to hypothecations of immovable property made before the coming into force of the Transfer of Property Act, 1882, Article 132 of the Act of 1877 applied and not Article 147, whatever might be the position with regard to mortgages created after the coming into force of the Transfer of Property Act, 1882. The view proceeded on the ground that in such cases there was only a *charge* and not a *mortgage* as defined in the Transfer of Property Act.¹⁰ This conflict has now been set at rest by the decision of their Lordships of the Privy Council in *Vasudeva Mudaliar v. Srinivasa Pillai*,¹¹ to the effect that this Article is confined to that class of mortgages in which the suit may be, and in fact always is, brought for *foreclosure or sale in the alternative* and that suits in respect of all other mortgages are governed by Article 132. Their Lordships observed as follows :

"The previous Act was Act 9 of 1871, in which Article 132, referring to suits 'for money charged upon immoveable property,' was practically the same as the present Article bearing that number. There was nothing corresponding to Article 147. Under that state of things it was perfectly settled law that suits of the present class (i. e. suits on simple mortgage) were governed by Article 132, whilst some uncertainty had been felt as to the rule of limitation applicable to another class of mortgages, the English mortgage.

"The two views taken under the Act of 1877 are these. According to one view, Article 147 applies to every suit by a mortgagee, in which he asks either for foreclosure or for sale. According to the other view, Article 147 applies only to the class of mortgages (English mortgages) in which the suit may be, and in fact always is, brought for 'foreclosure or sale', while Article 132 means what the corresponding Article meant before.

* * * * *

"The narrower construction escapes the necessity of attributing to the Legislature a great and sudden change of policy. It also gives effect to the ordinary presumption that the Legislature, when it repeats, in substance in a later Act, an earlier enactment that has obtained a settled meaning by judicial construction, intends the words to mean what they meant before. The other construction fails in both these particulars."

9. (1887) 14 Cal 730 (740) (F B).

[See also (1890) 1890 Pun Re No 112 (F B), *Ram Saran Dass v. Mehtab*]

10. See the cases cited in Foot-note 5 to Note 2 to Article 132, *ante*.

11. (1907) 30 Mad 426 (483, 484) . 34 Ind App 186 . 4 All L Jour 625 : 9 Bom L R 1104 : 11 Cal W N 1005 : 6 Cal L Jour 379 : 17 Mad L Jour 444 : 2 Mad L Tim 333 (P C).

After the said decision of the Privy Council it has now been held that Article 147 applies only to mortgages, such as the English mortgage, in which the suit is for foreclosure or sale in the alternative¹² and that Article 132 applies to all other suits to enforce mortgages.¹³

By Act 20 of 1929, Section 67 of the Transfer of Property Act, 1882, has been amended, the result of which is that a mortgagee under an English mortgage is not entitled to ask for *foreclosure*, but can only sue for *sale*. It would follow that, after the coming into force of the amendment, Article 147 can have no application to English mortgages in Provinces to which the Transfer of Property Act applies. The Article would apply only to English mortgages in Provinces to which the Transfer of Property Act does not apply, and perhaps to anomalous mortgages which provide for the remedies of foreclosure or sale.¹⁴

2. Applicability of Article to mortgages by deposit of title deeds.—Before the Transfer of Property Act, 1882, was amended by Act 20 of 1929, there was a difference of opinion as to the remedies available to a mortgagee by deposit of title deeds. The conflict arose by reason of the fact that Section 67 of the Transfer of Property Act, 1882, which specified the remedies of various mortgages did not specifically make any reference to mortgages by deposit of title deeds, though such mortgages were recognized by Section 59 of that Act. According to the High Court of Bombay, a mortgagee by deposit of title deeds was entitled to both the remedies of foreclosure and sale.¹ According to the Calcutta² and Madras³ High Courts, the remedy was only a suit for *sale*. This conflict has been set at rest by the amendment of Sections 58 and 67 of the Transfer

Article 147
Notes
1—2

12. (1924) A I R 1924 Mad 736 (737) 82 Ind Cas 399, *A. I. Campbell v. Audikesavulu*

13. (1924) A I R 1924 Mad 736 (737) 82 Ind Cas 399, *A. I. Campbell v. Audikesavulu*

(1917) A I R 1917 Mad 232 (233) 34 Ind Cas 475, *Ramayya v. Seshayya*

(1931) A I R 1931 Mad 542 (549) 133 Ind Cas 497, *Chandramma v. Gunna Seethan*

(1926) A I R 1926 All 493 (494, 496) 48 All 302 94 Ind Cas 849, *Sheoram Singh v. Babu Singh*. (Mortgage by conditional sale)

(1926) A I R 1926 All 551 (552) 95 Ind Cas 100, *Khan Sahai v. Mahurman*. (Usufructuary mortgage)

(1922) A I R 1922 Lah 39 (39) 3 Lah 233 69 Ind Cas 419, *Uttam Chand v. Mt. Thakar Devi*

14. See (1938) A I R 1938 Nag 112 (113) 1 L R (1938) Nag 91, *Bhagwantrao Anandrao v. Damodar Govindrao*.

Note 2

1. (1800) 14 Bom 269 (273), *Manel's Fraam v. Rustom's Naserwan's Muzri*.

(1877) 3 Bom 312 (330 to 332), *Gangpat Pandurang v. Adar's Dadabhai*.

(1897) 23 Bom 164 (169), *Khushal Sadashiv v. Punamchand Jusrupji*.

2. (1897) 24 Cal 348 (350) 1 Cal W N 225, *Srinath Roy v. Gadaihar Das*.

3. (1897) 21 Mad 326 (F B), *Ramachandra Govindrao v. Madhu Padda*.

Article 147
Notes
2-4

of Property Act, 1882, under which a mortgagee by deposit of title deeds has only the remedy of *sale* of the mortgaged property and not of foreclosure. It follows from what has been said in Note 1 *ante* that a suit to enforce an equitable mortgage is not within this Article.

3. "Mortgagee." — The word "mortgagee" will include all persons deriving title under him. This is made clear by Section 59A of the Transfer of Property Act, 1882, which, however, only gives legislative recognition to what was before recognized as the law. In view of the discussion in Note 1 *ante*, it is clear that the word "mortgage" in this Article refers only to the case of a mortgage in which a suit can lie for foreclosure or sale in the alternative.

4. Starting point. — Time, under this Article, runs from the date when the "money secured by the mortgage becomes due." The starting point is the same as that in Article 132 *ante*, the only difference being that the period of limitation is, under Article 132, twelve years from that date, and, under this Article, sixty years from that date.

As to when the money "becomes due," see generally Note 23 to Article 132, *ante*.

Article 148

148.* Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.	Sixty years.	When the right to redeem or to recover possession accrues: Provided that all claims to redeem arising under instruments of mortgage of immoveable property situate in Lower Burma which had been executed before the first day of May 1863 shall be governed by the rules of limitation in force in that province immediately before the same day.
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Act of 1877

Same as above, except that the words 'British Burma' occur in the third column in the place of 'Lower Burma.'

Synopsis

Article 148

1. Legislative changes.

1a. Scope.

2. "Mortgagee."

3. Redeeming co-mortgagor, position of.

4. Adverse possession by mortgagee against mortgagor.

5. Invalid transfer of equity of redemption to mortgagee — Effect.

6. Invalid foreclosure proceedings — Effect.

7. Mortgage providing that on default of mortgagor in paying the mortgage money within a fixed term, he should become absolute owner of the property — Effect.

8. Mortgagee purchasing the mortgaged property in contravention of Order 34 Rule 14, Civil Procedure Code.

9. Void mortgage—Person entering into possession under such mortgage.

10. Extinction of mortgage by decree or order of Court.

11. Effect of proceedings under Bengal Regulation, 17 of 1806.

12. Abandonment of land by mortgagor.

13. Adverse possession by strangers.

Act of 1871

148. — Against a mortgagee to recover possession of immovable property mortgaged.

Sixty years

The date of the mortgage, unless where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing signed by the mortgagee or some person claiming under him, and, in such case, the date of the acknowledgment

Provided that all claims to redeem, arising under instruments of mortgage of immovable property situate in British Burma, which have been executed before the first day of May 1863 shall be governed by the rules of limitation in force in that Province immediately before the same day

Act of 1859

Section 1, clause 15 — To suits against a depositary, pawnee or mortgagee of any property moveable or immovable, for the recovery of the same—a period of thirty years if the property be moveable, and sixty years if it be immovable, from the time of the deposit, pawn or mortgage, or if in the meantime an acknowledgment of the title of the depositor, pawner or mortgagor, or of his right of redemption shall have been given in writing signed by the depositary, pawnee or mortgagee or some person claiming under him, from the date of such acknowledgment in writing

Limitation of thirty and sixty years. Suits against depositaries, pawnbrokers or mortgagees.

Article 148
Note 1

14. "To redeem or to recover possession."
15. Claim for surplus profits — Limitation.
16. Accessions to mortgaged property.
17. "Immoveable property."
18. Starting point of limitation.
19. This Article and Article 134.
20. This Article and Article 126.
21. Suit by puisne mortgagee for redemption of prior mortgage.
22. Suit by execution purchaser of equity of redemption.
23. Burden of proof.
24. Laches of mortgagor.
25. Effect of bar of limitation.
26. Special or local law.
27. Punjab Redemption of Mortgages Act, 2 of 1913—Dismissal of application for redemption under — Effect.

Other Topics

Article applies to *all* mortgages ... See Note 2, Pt. 3
 Co-mortgagee redeeming another co-mortgagee—His possession is not adverse to mortgagor ... See Note 4 F N (8)
 Decree for redemption passed—Second suit for redemption ... See Note 10, Pt. 1

No date fixed for payment in mortgage deed—Right to redeem accrues immediately on execution of deed ... See Note 18, Pt. 5
 Suit against redeeming co-mortgagor—Starting point of limitation ... See Note 8, Pts. 6, 7
 Suit to redeem usufructuary mortgage ... See Note 1a, Pt. 1, Note 2 F N (3)

1. Legislative changes.

1. Before the Act of 1859, there was no provision prescribing any period of limitation for a suit to redeem or to recover possession of mortgaged property.¹
2. Section 1 clause 15 of the Act of 1859 provided a period of sixty years for a suit against a mortgagee of immovable property for the recovery of the property.² There was a similar provision in

Article 148—Note 1

1. (1900) 27 Cal 1004 (1010) 27 Ind App 103; 4 Cal W N 565; 7 Sar 718 (P C), *Fatimatulnissa Begum v. Sunder Das*.
 (1865) 2 Mad H O R 382 (383), *Purushotam Nambudri v. Kunju Menevan*.
 (1925) A I R 1925 Lah 105 (106) 78 Ind Cas 368, *Shahadat v. Ganesh Das*.
 (1894) 1894 All W N 87 (87), *Jamna Prasad v. Gokha*.
 [See (1863) 1 Mad H O R 146 (147), *Pudiyakoulagalla v. Kadinni*.
 (1909) 2 Ind Cas 469 (470) (Bom), *Hiralal Ichhalal v. Narsilal*.]
2. See the following decisions bearing on the above provision:
 (1867) 5 Bom H O R (A C) 176 (179), *Ahiloji Khandoji v. Dongar Harichand*.

Article 148 of the Act of 1871. The chief points of difference between the above provisions and the corresponding provisions in the Acts of 1877 and 1908 are as follows :

- (a) The provisions in the Acts of 1859 and 1871 only applied to suits for possession of the mortgaged property and did not apply to *suits for redemption where possession was not asked for*. But the Articles in the later enactments apply to both kinds of suits.
- (b) Under the Acts of 1859 and 1871, the period of limitation began to run from the date of the mortgage,³ whereas under the Acts of 1877 and 1908, the starting point of limitation is the time when the right to redeem or to recover possession accrued.
- (c) Section 1, clause 15 of the Act of 1859 and Article 148 of the Act of 1871 contained within themselves provisions as to the computation of a fresh period of limitation in case of an acknowledgment of liability by the mortgagee.⁴ But in the Acts of 1877 and 1908, such provisions were omitted, and at the same time the scope of Section 19 (which previously applied only to debts and legacies) was enlarged so as to include suits for redemption of mortgages. (See Note 16 to Section 19.)

3. The present Article is merely a reproduction of Article 148 of the Act of 1877 with this difference that the words "British Burma" in the third column of the Article in the prior enactment have been replaced by the words "Lower Burma"

(1871) 3 N W P H O R 119 (120), *Mahomed Abdul Ruzzal v. Asif Ali Shah*.

(1867) 2 Agra 227 (227), *Chuzjoo Singh v. Nazir Hossein*.

(1878) 18 Beng L R 177 (179, 180, 181) 2 Suther 897. 20 Suth W R 375 (P C), *Luchmee Buhsh Roy v. Runjeet Ram Pandey*.

(1900) 27 Cal 1004 (1010, 1011) 27 Ind App 103 4 Cal W N 565 7 Sac 718 (P C), *Fatimatulnissa Begum v. Sundar Das*.

(1868) 9 Suth W R 187 (189) Beng L R Sup Vol. 901 (F B), *Lall Doss v. Jamal Ali*.

(1868) 10 Suth W R 478 (480, 482), *Runjjet Narain Singh v. Shurfoonissa*.

(1892) 5 Mad 192 (184), *Mulhkan v. Manan*.

3. (1894) 6 All 551 (557, 558) 1894 All W N 193 (F B), *Shib Lal v. Ganga Prasad*.

(1891) 1891 Bom P J 116 (116), *Mahiana v. Varjial*.

(1906) 28 All 333 (335) 1906 All W N 23 3 All L Jour 113, *Muhammad Akbar Husain v. Issat un nissa*.

(1894) 1 Cal W N 513 (516), *Sundar Das v. Fatimatulnissa Begum*.

4. See the following decisions bearing on the above provisions :

(1894) 1894 All W N 87 (87), *Jamna Prasad v. Golla*.

(1893-94) 17 Bom 173 (178, 181, 183), *Bhagjilal v. Amritlal*.

(1875-77) 1 All 425 (426, 427) 2 Ind Jur 115, *Dina Chand v. Sarfras Ali*.

(1875-77) 1 All 117 (123) (F B), *Dina Chand v. Sarfras*.

(1911) 10 Ind Cas 238 (240) (All), *Chunni v. Hakim Singh*.

(1930) 1 I R 1930 Bom 55 (57) 122 Ind Cas 662, *Dhondhi Shrivast v. Laxman Mahasabji*.

(1900) 1900 Pan Re No 62, *Bhikaji Das v. Muhammad Yusuf*.

Article 148
Note 1a

1a. Scope.—This Article applies to two classes of suits :

1. Suits to *redeem* mortgages.
2. Suits to recover possession of immovable property mortgaged.

A right to *redeem* is a right to require the mortgagee, on payment of the mortgage money, to do the various things referred to in Section 60 of the Transfer of Property Act, 1882, the first three paragraphs of which run as follows :

"60. At any time after the principal money has become *due*, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor, either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished.

"Provided that the right conferred by this Section has not been extinguished by act of the parties or by *decree* of a Court.

"The right conferred by this Section is called a right to *redeem* and a suit to enforce it is called a suit for redemption."

In a suit for redemption a preliminary decree is passed under Order 34 Rule 7 of the Civil Procedure Code fixing a time within which the mortgagor is to pay the amount found due, and providing for what is to happen on default. After the expiry of the date fixed for payment, a final decree is passed under Order 34 Rule 8 of the Civil Procedure Code requiring the mortgagee to do the various things specified in Section 60 referred to above if the mortgagor has made the payment, or, if the amount is not paid as directed, declaring that the mortgage is foreclosed or ordering the property to be sold, as the case may be.

Where the mortgage amount *has been paid off*, but the mortgagee is in possession of the mortgaged property, and the mortgagor sues to recover possession of the property, the suit is not one for redemption as contemplated by this Article, but a suit to recover possession

(1888) 1888 Pun Re No. 157, *Hakhat Rai v. Ganga Das*.

(1880) 1880 Pun Re No. 32, *Lala Mal v. Gulam Mahomed*.

(1878) 1878 Pun Re No. 78, *Kair Muhammad v. Ahmudin*.

(1877) 1877 Pun Re No. 93, *Deota v. Kesho*.

(1877) 1877 Pun Re No. 61, *Mt Mah Bibi v. Motan Mal*.

(1918) A I R 1918 Mad 86 (87) : 43 Ind Cas 50, *Raman Kurup v. Chappan Nair*.

of the mortgaged property. A decree in such a suit is to be passed in the manner prescribed by Order 34 Rule 9 of the Civil Procedure Code. There are not two decrees to be passed in such suits as in the case of suits for redemption.

It will be seen from the above that a suit to redeem a usufructuary mortgage involves also a prayer for possession of the mortgaged property and is substantially a suit for possession.¹ But a suit for possession of the mortgaged property, where no payment is to be made by the mortgagor, is not a suit for redemption, as contemplated by the Article.

The period of limitation for both classes of suits is sixty years.

2. "**Mortgagee.**"—This Article applies only to a suit against a mortgagee.¹ Thus, it does not apply to a suit against a chargeholder² But it applies to all kinds of mortgage.³

Note 1a

1. (1924) A I R 1924 Mad 292 (296) 47 Mad 203. 79 Ind Cas 510, *Appamma v. Chinnareadu*.
- (1936) A I R 1936 Pat 63 (64) 160 Ind Cas 1066, *Basynath Prasad v. Muneshwar*

Note 2

1. (1926) A I R 1926 Cal 910 (911) 94 Ind Cas 342, *Keshab Lal v. Dholanath*. (1882) 6 Bom 674 (678, 680), *Gopal Sitaram v. Desai*. (Held that the transaction in question was a conveyance for a term of years and not a mortgage within the meaning of this Article.)

See the following cases which are illustrative of what are and what are not mortgages for the purpose of this Article :

- (1925) A I R 1925 Cal 862 (864, 866) 86 Ind Cas 353, *Mohini Mohan v. Sarat Sundari*.
- (1890) 14 Mad 312 (315), *Raman v. Shathanathan*
- (1916) A I R 1916 Oudh 128 (128) 32 Ind Cas 353, *Raghunath Prasad v. Mt. Kethi*
- (1917) A I R 1917 Oudh 208 (209) 38 Ind Cas 626, *Mahabir Singh v. Sheo Ratan*
- (1924) A I R 1924 Oudh 169 (170) 74 Ind Cas 42, *Baldeo v. Sher Bahadur Singh*.
- (1910) 6 Ind Cas 183 (187, 188) (All), *Jhanda Singh v. Wahid-ud-din*.
- (1883) 1883 Pan Re No. 57, *Deva Singh v. Harnam Singh*.
- (1864) 1 Suth W R 7 (9), *Pultun Singh v. Reshal Singh*
- (1904) 26 All 837 (841) 1 All L Jour 48 1904 All W N 39, *Jai Ram v. Makunda*
- 2 (1931) A I R 1931 Lah 744 (745) 12 Lah 671 135 Ind Cas 506, *Jhandu v. Nur Mahomed*
- (1926) A I R 1926 Lah 238 (238) 92 Ind Cas 950, *Narain Das v. Saraj Din*.
- (1923) A I R 1923 Lah 311 (312) 71 Ind Cas 847, *Wazir v. Girdhars*
- (1920) A I R 1920 Lah 234 (238) 55 Ind Cas 450, *Basant v. Dhanna Singh*
- (1919) A I R 1919 Cal 631 (635) 46 Cal 111 45 Ind Cas 753, *Purna Chandra Pal v. Parada Prasanna*
- (1922) A I R 1922 All 410 (411) 77 Ind Cas 119, *Surat Singh v. Umrao Singh*
- (1914) A I R 1914 All 547 (548) 27 Ind Cas 35, *Isid Ali v. Anand Sarup*
- (1921) A I R 1921 Mad 326 (326), *Sinnama Chettiar v. S. Palani Ammal*
[But see (1923) A I R 1923 Pat 93 (99) 63 Ind Cas 2-2, *Ram Narain Das v. Ram Doss Das* (Limitation Act recognises no distinction between charge and mortgage)]
8. (1873) 20 Suth W R 375 (376) 2 Suther 897 13 Peng L R 177 (P C), *Luchmee Bulsh Roy v. Runjeet Ram Pandey* (Section 1, clause 15 of Act of 1859 applied to usufructuary mortgages also)

Article 148
Note 2

Where there is a partial failure of consideration for a mortgage, the mortgage is valid to the extent of the consideration that has not failed and so the possession of the mortgagee under the mortgage deed is only in his capacity as mortgagee and a suit against him for the recovery of the property is within this Article.⁴

The term "mortgagee" in this Article includes any person who has acquired the rights of a mortgagee,⁵ by assignment,⁶ subrogation⁷ or otherwise.⁸

Where a third person who has no interest in the equity of redemption voluntarily pays off a mortgage, he cannot thereby obtain the rights of the mortgagee, and if on paying off the mortgage he gets into possession of the mortgaged property, his possession is only that of a stranger and not that of a mortgagee and a suit against him for the recovery of the property will not be governed by this Article.⁹ But, in a recent case,¹⁰ the Madras High Court has held that where a person, though not having any interest in the equity of redemption, pays off a mortgage in the *bona fide* belief that he is entitled to the equity of redemption, he is subrogated to the rights of the mortgagee and a suit against such a person will be within this Article.

(1927) A I R 1927 Lah 828 (830) : 101 Ind Cas 549, *Dattu Mal v. Ilahi Baksh*. (Article applies to *lekha mukhi* mortgages.)

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English mortgage.)

4. (1911) 9 Ind Cas 289 (290, 291) : 35 Mad 114, *Tirumal Raju v. Pandla Muthal Naidu*.

5. (1879) 2 Mad 226 (227, 228), *Ammu v. Ramakrishna Sastri*.

6. (1887) 9 All 97 (102) : 1886 All W N 303, *Bhagwan Sahai v. Bhagwan Din*.
(1920) A I R 1920 Bom 350 (351) : 44 Bom 614 : 57 Ind Cas 568, *Taramiya Pirsahab v. Shibelisahab Fakirsahab*.

(1873) 21 Suth W R 13 (13), *Jeechoo Sahoo v. Syud Musseevollah*.

(1892) 15 Mad 331 (332), *Arumuga v. Chockalingam*.

7. (1936) A I R 1936 Pat 60 (61) : 160 Ind Cas 933, *Ram Dayal Sen v. Chakrapani Nandi*. (Puisne mortgagee paying off prior mortgage.)

8. (1925) A I R 1925 Sind 167 (170) : 79 Ind Cas 466 : 19 Sind L R 268, *Mahomed Moosa v. Kazi Fatehullah*. (Auction-purchaser of interest of mortgagee purchasing under *bona fide* belief that he is purchasing full title only gets rights of a mortgagee and this Article applies to suit against him.)

9. (1924) A I R 1924 All 834 (836) : 78 Ind Cas 1026, *Bijai Bahadur v. Parmeshwari Ram*.

(1936) A I R 1936 Mad 303 (309) : 161 Ind Cas 999, *Veetil Kelu v. Chekkara Chappan*.

See also Note 85 to Article 144.

[But see (1883) 1883 Pun Re No. 124, *Azim v. Mahmud*. (The view taken in this case that the stranger becomes an assignee of the mortgagee interest, is, it is submitted, not correct.)]

10. (1937) A I R 1937 Mad 451 (455) : 172 Ind Cas 47, *Veetil Kelu v. Chekkara Chappan*.

[See also (1912) 16 Ind Cas 27 (28) (Mad), *Rayslu Patter v. Annakutti Mannadiar*.]

In the undermentioned case¹¹ it was held by the Bombay High Court that if a stranger pays off a mortgage *with the knowledge and consent of the mortgagor*, such stranger acquires a *lien* on the mortgaged property and that so long as such lien remains enforceable by a suit under Article 132 *supra*, the possession of the *lienor* will not be adverse to the mortgagor but such possession will be adverse to the mortgagor from the expiry of the period of limitation under Article 132. It is submitted that the view that the possession of the *lienor* becomes adverse to the mortgagor as soon as a suit to enforce the lien becomes time-barred under Article 132 is not correct. The possession of the *lienor* cannot change its character merely because limitation for a suit to enforce the lien has expired, in the same way as the possession of a mortgagee does not become adverse to the mortgagor merely because the period of limitation for a suit to enforce the mortgage has expired. (See Note 28 to Article 144.)

3. Redeeming co-mortgagor, position of.—Before the amendment of Section 92 of the Transfer of Property Act by Act 20 of 1929, there was a conflict of decisions as to the position of a co-mortgagor who redeems a mortgage and as to the period of limitation applicable to a suit by the other co-mortgagors for the recovery of their shares of the property which the redeeming co-mortgagor takes possession of on redemption. The decisions fall into three groups :

1. According to the *first* set of decisions, the redeeming co-mortgagor steps into the shoes of the mortgagee¹ and a suit against such redeeming co-mortgagor is governed by this Article.^{1a}
2. According to the *second* set of decisions, the redeeming co-mortgagor acquires only a *charge* on the shares of the

11 (1911) 12 Ind Cas 362 (363) . 35 Bom 438, *Sambu Hanmantia Koba v. Nana Narayan*

Note 3

1. (1894) 16 All 254 (255) ; 1894 All W N 72, *Gobardhan v. Sujan*
(1892) 14 All 1 (2) ; 1891 All W N 211 11 All 423 (F B), *Ashfaq Ahmad v. Wazir Ali*.
[See (1910) 5 Ind Cas 123 (123) . 32 All 100, *Saiduddin Khan v. Ratan Lal*.
(1892) 15 Mad 331 (332), *Arumuga v. Chokalingam*.]
- 1a. (1929) A I R 1929 All 100 (101), 113 Ind Cas 832, *Shiam Lal v. Mt. Hukum Kuar*.
(1922) A I R 1922 All 410 (410) 77 Ind Cas 113, *Surat Singh v. Umrao Singh*.
(1918) A I R 1918 All 386 (387) 40 All 683 47 Ind Cas 633, *Wazir Ali v. Ali Islam*.
(1916) A I R 1916 All 201 (202) 38 All 540 . 36 Ind Cas 452, *Khatia Ram v. Taik Ram*.
(1889) 11 All 423 (437, 438) 14 All 1 1891 All W N 211 (F B), *Ashfaq Ahmad v. Wazir Ali*.
(1886) 8 All 293 (300) . 1886 All W N 98, *Nura Bibi v. Jajai Narain*.
(1886) 1886 All W N 152 (152), *Raghuraj Sahas v. Bungad Ali*.
(1885) 1885 All W N 300 (300), *Ram Singh v. Baldeo Singh*.
(1930) A I R 1930 Nag 300 (301) 27 Nag L R 152 127 Ind Cas 529, *Jai Ram v. Bhudaji*.

3. (1912) 15 Ind Cas 500 (503) (Bom), *Bhaiji Shamrao v. Hajimiyah Mahamad*.
 (1891) 16 Bom 191 (196) : 1891 Bom P J 123, *Faki Abbas v. Faki Nurudin*.
 (1885) 1885 All W N 51 (52), *Karimdad Khan v. Fawzan Bibi*.
 (1919) A I R 1919 Oudh 357 (359) : 52 Ind Cas 878, *Sheo Ganga Baksh Singh v. Ranjit Singh*.
 (1920) 2 Lah L Jour 160, *Shahabuddin v. Kasam Ali Khan*.
 (1911) 9 Ind Cas 572 (574) : 83 All 463, *Jagdip Narain Singh v. Billar Singh*.
[See (1883) 7 Mad 26 (28) : 1 Weir 610, Chathu Nair v. Aku.
 (1886) 11 Bom 422 (425), *Ramchandra Fashwant v. Sadashiv Abaji*.

Hence, a suit against such co-mortgagor by any of the other co-mortgagors for the recovery of his share of the property on paying the proportionate amount due from him will be a suit against a *mortgagee* within the meaning of this Article and as such will be governed by this Article.⁴

Where a usufructuary mortgage is satisfied out of the rents and profits of the property, and thereafter the property is taken possession of by one of several co-mortgagors, his position is not that of a co-mortgagor who has redeemed the mortgage, and so a suit by the other co-mortgagors for the recovery of their shares from him is not governed by this Article.⁵

In some decisions, though Article 148 has been applied to the suit against a redeeming co-mortgagor by the other co-mortgagors, the starting point of limitation has been held to be the date of the redemption of the mortgage by the defendant.⁶ It is obvious that such a view is incorrect inasmuch as the starting point of limitation under this Article is the date when the right to redeem the mortgage accrues, so that, in the case of a suit against a co-mortgagor who has redeemed a mortgage, limitation under the Article will begin to run from the date when the right to redeem the mortgage accrued and not from the date when the defendant co-mortgagor paid off such mortgage and became subrogated to it.⁷

(1918) 20 Ind Cas 580 (584) : 16 Oudh Cas 163, *Muhamad Taqi v. Muhamad Baqar*.]

4 (1934) A I R 1934 All 946 (917) 153 Ind Cas 664, *Narottam Das v. Sanwal Dass*

(1933) A I R 1933 All 228 (229) 144 Ind Cas 152, *Ahmad Zaman Khan v. Baldeo Das*.

(1933) A I R 1933 Oudh 127 (133, 134) 174 Ind Cas 714 (F B), *Kundanlal v. Sheikh Faqir Balsh*

The contrary view taken in the following cases is not correct

(1933) A I R 1933 Lah 91 (92) 141 Ind Cas 404, *Mt. Radha v. Ajudhia Prashad*

(1936) A I R 1936 Lah 290 (291) 159 Ind Cas 633, *Mohammad Ali v. Ghulam Nabi*

(1931) A I R 1931 Lah 744 (745) 12 Lah 671 135 Ind Cas 506, *Jhandu v. Nur Mahomed*.

(1933) A I R 1933 Bom 114 (117) 57 Bom 134 144 Ind Cas 8, *Ramchandra Khascrao v. Ganesh Balwant*.

(1938) A I R 1938 Rang 65 (67) 176 Ind Cas 923, *Ma F Khin v. P S Mohamed Ali*

(1931) 132 Ind Cas 261 (262) (Oudh), *Ram Agre v. Ramudis*

5 (1913) 20 Ind Cas 580 (584) 16 Oudh Cas 163, *Muhamad Taqi v. Muhamad Baqar*

(1897) 20 All 192 (184) 1893 All W N 19, *Inayat Hussin v. Ali Hussain*

(1894) 16 All 251 (255) 1894 All W N 72, *Gobardhan v. Surjan*

6. (1930) A I R 1930 Nag 300 (304) 27 Nag L R 152 127 Ind Cas 889, *Jairam v. Bhilaji*.

7. (1889) 14 All 1 (2) · 11 All 423 1891 All W N 211 (F B), *Ashfaq Ahmad v. Wazir Ali*

(1916) A I R 1916 All 201 (202) 36 Ind Cas 452 33 All 540, *Khalid Ram v. Taib Ram*

(1922) A I R 1922 All 410 (410) 77 Ind Cas 113, *Surat Singh v. Umrao Singh*

Article 148

Note 4

4. Adverse possession by mortgagee against mortgagor. — This Article only applies where the suit is against a mortgagee as such. Where the mortgagee is not entitled as such to the possession of the mortgaged property but enters into possession without title, the suit against him for the recovery of the property will not be within this Article.

A mortgagee who has entered into possession of the mortgaged property as mortgagee cannot, during the subsistence of the mortgage, convert the nature of his possession into that of a full owner, merely by asserting his absolute title to the property.¹ Nor does a mere order in mutation proceedings entering the name of the mortgagee

Note 4

1. (1905) 32 Cal 296 (312) : 32 Ind App 23 : 9 Cal W N 201 : 2 All L Jour 71 : 7 Bom L R 1 : 1 Cal L Jour 584 : 8 Sar 784 (P C), *Khairajmal v. Dawn*

(1923) A I R 1923 All 613 (618) : 74 Ind Cas 830, *Raghunath Singh v. Jetto Singh*.

(1915) A I R 1915 All 203 (206) : 29 Ind Cas 403, *Panna Lal v. Rameshar Sahai*.

(1911) 10 Ind Cas 999 (1000) (All), *Gandharp Singh v. Harikishna*.

(1908) 1908 All W N 1 (2) : 4 All L Jour 787 : 3 Mad L Tim 132, *Jhapa Lal v. Chajju Mal*.

(1875) 7 N W P H C R 220 (222) (F B), *Sheopal v. Khadim Hossein*.

(1896) 21 Bom 793 (796), *Pandu v. Anpurna*

(1889) 14 Bom 279 (281) : 1889 Bom P J 311, *Bhagvant Govind v. Kondi Mahadu*.

(1868) 10 Suth W R 219 (220), *Ajoodhya Pershad v. Esharee Dyal*.

(1926) A I R 1926 Lah 549 (550) : 95 Ind Cas 9, *Jawan Singh v. Ghasia*.

(1908) 1908 Pun Re No. 28 : 1908 Pun W R No. 41 : 1908 Pun L R No. 141, *Balwant Singh v. Ramdas*.

(1882) 1882 Pun Re No. 49, *Teju Mal v. Zulfakar Shah*.

(1920) A I R 1920 Mad 16 (18) : 109 Ind Cas 795, *Kandaswamy Mudaliar v. Ponnuswami Mudaliar*.

(1914) A I R 1914 Mad 578 (579) : 37 Mad 545 : 16 Ind Cas 694, *Usman Khan v. Nagalla Dasanna*.

(1914) A I R 1914 Mad 489 (493) : 15 Ind Cas 343 (346) : 37 Mad 423, *Ariya Puthira Padayachi v. Muthukumaraswami Padayachi*.

(1902) 25 Mad 507 (511) : 12 Mad L Jour 119, *Seshamma Shettati v. Chockaya Hegade*.

(1902) 25 Mad 507 (511) : 12 Mad L Jour 119, *Seshamma Shettati v. Chockaya Hegade*.

Mirza v. Ahmad Shah

(1926) A I R 1926 Oudh 517 (518) : 95 Ind Cas 849, *Niranhar Prasad v. Mt. Bechai*.

(1926) A I R 1926 Oudh 491 (492) : 93 Ind Cas 832, *Bayrang Bali v. Mt. Maharaja*.

(1921) A I R 1921 Oudh 124 (125) : 21 Oudh Cas 155 : 63 Ind Cas 284, *Mahendra Bahadur Singh v. Chandrapal Singh*.

(1920) A I R 1920 Oudh 302 (304) : 23 Oudh Cas 269 : 60 Ind Cas 404, *Tilak Chand v. Shambhu Singh*.

(1912) 14 Ind Cas 584 (585) : 15 Oudh Cas 39, *Amir Ali v. Niaz Ali*.

as proprietor change the character of his possession.² But it has been held that a decree of a Settlement Court declaring the mortgagee to be the owner of the property has the effect of altering the character of his possession so as to take out of the purview of this Article the mortgagor's suit for the recovery of the property.³

The mere fact that a mortgage has been discharged out of the usufruct of the property or otherwise, does not alter the character of the possession of the mortgagee (who continues in possession after such discharge) and make the possession one held as *owner* and not as mortgagee.⁴ So also, the continuance in possession of a mortgagee

(1911) 11 Ind Cas 853 (853) (Low Bur), *Mg. Shue Paung v. Maung On*.

(1926) A I R 1926 Pat 512 (513) : 97 Ind Cas 348 . 6 Pat 102, *Dinannth Rai v. Rama Rai*.

(1926) 93 Ind Cas 934 (934) (Lah), *Jowahar v. Amar Chand*.

[See also (1863) 1 Mad H C R 146 (147), *Pudiyakovilagalla v. Allu-nannalatta Kadams*

(1889) 18 Mad 89 (40), *Rairu Nayar v. Moidin* (When a mortgage was in fact for Rs 62, the mortgagee cannot by merely asserting for over twelve years that the mortgage was for a larger amount acquire a prescriptive right to hold as a mortgagee for the larger amount by alleging the renewal of the mortgage deed)]

2. (1926) A I R 1926 Oudh 594 (600) 97 Ind Cas 922 1 Luck 529, *Achhe Mirza v. Ahmad Shah*

(1923) 72 Ind Cas 989 (993) (Pesb), *Ghulam Haidar Shah v. David Shah*.

(1925) A I R 1925 All 34 (35) : 80 Ind Cas 944, *Ram Ganesh Rai v. Rup Narain Rai*.

(1929) 120 Ind Cas 789 (790) (Lah), *Godar v. Nizamdin*.

[But see (1918) A I R 1918 Lah 197 (198) . 48 Ind Cas 447, *Ram*

proprietary body of the village and mutation was effected in his favour, without any objection from the proprietary body—Held that the possession of the mortgagee became adverse to the proprietary body of the village from the date of the mutation]]

3. (1904) 7 Oudh Cas 259 (263, 264), *Basawan Singh v. Nawab Badshah Bahau Begam*

(1920) A I R 1920 Oudh 302 (304) . 23 Oudh Cas 263 . 60 Ind Cas 404, *Tilak Chand v. Shambu Singh*.

4. (1883) 1833 All W N 202 (202), *Kedar Nath v. Ulfat Rai*

(1926) A I R 1926 Bom 40 (42) 49 Bom 847 91 Ind Cas 349, *Rachappa Chanbasappa v. Nengappa*

(1926) A I R 1926 All 136 (138) 89 Ind Cas 574, *Mt. Dets Bai v. Tanyia Singh*

(1930) A I R 1930 Cal 15 (16) 56 Cal 1130 121 Ind Cas 407, *Harant Golder v. Jaladhar Biswas*.

(1926) A I R 1926 Cal 910 (912) 94 Ind Cas 342, *Keshab Lal v. Bholanath*.

(1910) 7 Ind Cas 385 (386) 33 All 97, *Sudarshan Das v. Ram Pershad*.

(1912) 13 Ind Cas 963 (964) 34 All 261, *Haberbullah v. Abdul Hamid*.

(1933) A I R 1933 Oudh 13 (14, 15) 140 Ind Cas 189, *Ram Bakhsh Singh v. Ganga Pal Singh*

(1919) 37 Mad L Jour (N R C) 6 (6).

(1924) A I R 1924 All 522 (522) 83 Ind Cas 740 *Gorind Ram v. Ram Keer*

[But see (1924) 46 Mad L Jour (N R C) 80 (80) (When mortgagee after redemption refuses to give up possession, the nature of his possession is altered and thereafter he sets up title as owner to the knowledge of the mortgagor and a suit for possession must be filed within twelve years of the date on which the nature of defendant's possession was altered)]

Article 148

Note 4

4. Adverse possession by mortgagee against mortgagor. —

This Article only applies where the suit is against a mortgagee as *such*. Where the mortgagee is not entitled as such to the possession of the mortgaged property but enters into possession without title, the suit against him for the recovery of the property will not be within this Article.

A mortgagee who has entered into possession of the mortgaged property as *mortgagee* cannot, during the subsistence of the mortgage, convert the nature of his possession into that of a full owner, merely by asserting his absolute title to the property.¹ Nor does a mere order in mutation proceedings entering the name of the mortgagee

Note 4

1. (1905) 32 Cal 296 (312) : 32 Ind App 23 : 9 Cal W N 201 : 2 All L Jour 71 : 7 Bom L R 1 . 1 Cal L Jour 584 : 8 Sar 784 (P C), *Khairajmal v. Daim*.

Ram Narain Singh.

- (1923) A I R 1923 All 613 (618) : 74 Ind Cas 830, *Raghunath Singh v. Jetto Singh*.

- (1915) A I R 1915 All 203 (206) : 29 Ind Cas 403, *Panna Lal v. Rameshar Sahai*.

- (1911) 10 Ind Cas 999 (1000) (All), *Gandharp Singh v. Harakishna*.

- (1908) 1908 All W N 1 (2) . 4 All L Jour 787 . 3 Mad L Tim 192, *Jhaba Lal v. Chajju Mal*.

- (1875) 7 N W P H C R 220 (222) (F B), *Sheopal v. Khadim Hossein*.

- (1896) 21 Bom 793 (796), *Pandu v. Anpurna*.

- (1889) 14 Bom 279 (281) : 1889 Bom P J 311, *Bhagvant Govind v. Konda Mahadu*.

- (1868) 10 Suth W R 219 (220), *Ajoodhya Pershad v. Esharee Dyal*.

- (1926) A I R 1926 Lah 549 (550) : 95 Ind Cas 9, *Jivan Singh v. Ghasia*.

- (1908) 1908 Pun Re No. 28 : 1908 Pun W R No. 41 : 1908 Pun L R No. 141, *Balwant Singh v. Ramdas*

- (1882) 1882 Pun Re No. 49, *Teju Mal v. Zulfakar Shah*.

- (1929) A I R 1929 Mad 16 (18) : 109 Ind Cas 795, *Kandaswamy Mudaliar v. Ponnuswami Mudaliar*.

- (1914) A I R 1914 Mad 578 (579) . 37 Mad 545 : 16 Ind Cas 694, *Usuman Khan v. Nagalla Dasanna*.

- (1914) A I R 1914 Mad 489 (493) : 15 Ind Cas 343 (346) : 37 Mad 423, *Ariya Puthira Padayachi v. Muthukumaraswami Padayachi*.

- (1902) 25 Mad 507 (511) : 12 Mad L Jour 119, *Seshamma Shettlati v. Chickaya Hegade*.

Chhe

- (1926) A I R 1926 Oudh 517 (518) . 95 Ind Cas 849, *Niranhar Prasad v. Mt. Bechas*

- (1926) A I R 1926 Oudh 491 (492) . 92 Ind Cas 832, *Dajrang Bali v. Mt. Mahrajna*.

- (1921) A I R 1921 Oudh 124 (125) . 24 Oudh Cas 155 : 63 Ind Cas 284, *Mahendra Bahadur Singh v. Chandrapal Singh*.

- (1920) A I R 1920 Oudh 302 (304) : 23 Oudh Cas 269 : 60 Ind Cas 404, *Talak Chand v. Shambhu Singh*.

- (1912) 14 Ind Cas 584 (585) . 15 Oudh Cas 39, *Amir Ali v. Niaz Ali*.

5. Invalid transfer of equity of redemption to mortgagee — Effect.—For a full discussion on the subject, see Note 28 to Article 142 *ante*. Suppose the mortgagor transfers or relinquishes in favour of the mortgagee the equity of redemption and such transfer or relinquishment is invalid and inoperative, is the mortgagee's possession from the date of such attempted transfer in his character as mortgagee or under a claim of full ownership? On this question, there is a conflict of decisions. The generally accepted view is that though the transfer may fail to vest the equity of redemption in the mortgagor, the possession of the mortgagee from the date of the transfer will be not in his character as mortgagee but under a claim of full ownership, so as to take out of the purview of this Article the suit by the mortgagor for the recovery of the property from the mortgagee.¹ This view proceeds on the ground that the parties to a mortgage can agree as to what the character of the possession held

(1930) A I R 1930 Mad 305 (314, 315) . 123 Ind Cas 591 : 53 Mad 805, *Ambu Nair v. Kelu Nair* (Suit for possession by usufructuary mortgagee—Rajnama decree granting possession to mortgagee and providing *inter alia* that mortgagor after depositing mortgage money should get possession of properties from mortgagee failing which mortgagee to continue in possession as mortgagee — If possession is not delivered

(1922) A I R 1922 Mad 407 (408) : 70 Ind Cas 33, *Omayurupagam Mutt v. Suasooria Thevan*.

(1926) A I R 1926 Sind 145 (148) 91 Ind Cas 87 : 20 Sind L R 277, *Sullem Hashim v. Esso* (Mortgagee taking possession as mortgagee, but wrongfully—Still his possession is only as mortgagee)

(1910) 5 Ind Cas 478 (479) (Mad), *Sangamma Naicker v. Ramaswamy Naicker* (Mortgagor's claim in a prior suit to declare the mortgage bad does not enable mortgagee to prescribe to the mortgaged property from mortgage date—His second suit to redeem mortgage not barred under Article 144, Limitation Act, 1877)

(1923) A I R 1923 Lah 366 (368) . 78 Ind Cas 475, *Shujauddin v. Sher Mohamed* (Co-mortgagee redeeming another co-mortgagee — His possession does not become adverse against mortgagor)

Note 5

1. (1928) A I R 1928 All 726 (730) 50 All 950 118 Ind Cas 177 (F B), *Sohan Lal v. Mohan Lal*.

(1929) A I R 1929 Mad 16 (18, 19) 109 Ind Cas 795, *Kandasami Mudaliar v. Ponnusami Mudaliar*.

(1921) A I R 1921 Mad 213 (214, 216) 63 Ind Cas 215, *Musajadu v. Gopala Reddy*

(1921) A I R 1921 Mad 82 (83, 84, 85) 44 Mad 253 62 Ind Cas 603, *Kandasami Pillai v. Chinnappa*

(1916) A I R 1916 Mad 811 (815, 816) 31 Ind Cas 678, *Gerundu v. Mallayya*

(1914) A I R 1914 Mad 578 (579, 580) 37 Mad 545 16 Ind Cas 694, *Uman Khan v. Nagalla Dasanna*

(1926) A I R 1926 Oudh 145 (145) . 90 Ind Cas 726, *Ilad Ali v. Pharoala*

(1925) A I R 1925 Oudh 383 (383) 57 Ind Cas 188, *Sheo Nath v. Thulin Lal Ram*.

(1921) A I R 1921 Oudh 121 (123) 24 Oudh Cas 145 63 Ind Cas 201, *Mohendra Bahadur Singh v. Chandrapal Singh*.

Article 148
Note 5

by the mortgagee should be from a certain date.² But the contrary view has been held in certain decisions,³ according to which the invalid transfer can have no effect on the character of the mortgagee's possession which therefore is only possession held as mortgagee in spite of such transfer, and so the suit against the mortgagee for the recovery of the property will be governed by this Article notwithstanding the attempted transfer of the equity of redemption to the mortgagee.

A mere contract to sell the equity of redemption in favour of a usufructuary mortgagee will not be sufficient to alter the character of the possession of the mortgagee.^{3a}

Where the mortgagee obtains a transfer of the equity of redemption from a third party who is not authorized to transfer it, the mortgagee's possession is not affected by such transfer and continues to be only a possession held as mortgagee.⁴ Hence, notwithstanding such transfer, a suit against the mortgagee for the possession of the property will only be a suit against a mortgagee and therefore, will be governed by this Article. On this principle, where there are several co-mortgagors and the equity of redemption in the mortgage is transferred to the mortgagee by one of the co-mortgagors, the possession of the mortgagee as regards the other co-mortgagors is only that of a mortgagee and a suit by such co-mortgagors will be governed by this Article.⁵ A contrary view, however, has been taken

2. (1914) A I R 1914 Mad 578 (579) : 16 Ind Cas 694 (695) : 37 Mad 545, *Usman Khan v. Nagalla Dasanna*.

(1922) A I R 1922 Oudh 7 (10) : 67 Ind Cas 572 : 25 Oudh Cas 115, *Bijai Partab Singh v. Raghuraj Singh*.

(1925) A I R 1925 Mad 566 (567) : 87 Ind Cas 331, *Sheikh Dawood v. Mohi-udeen Batcha*.

3. (1912) 13 Ind Cas 852 (853) (Lah), *Lehna Singh v. Santa Singh*.

(1915) A I R 1915 Mad 573 (574, 575) : 38 Mad 1158 : 25 Ind Cas 772, *Muthukaruppan v. Muthu Samban*.

(1914) A I R 1914 Mad 489 (493) : 15 Ind Cas 343 (346) : 37 Mad 423, *Aryaputhira Padayachi v. Muthukumarasami Padayachi*.

(1917) A I R 1917 Nag 83 (86) : 46 Ind Cas 872, *Awdh Singh v. Nanhai*.

3a (1925) A I R 1925 Oudh 114 (115) : 82 Ind Cas 406 : 28 Oudh Cas 100, *Silla Sahas v. Dhum Singh*.

4. (1907) 29 All 640 (647) : 1907 All W N 221 : 4 All L Jour 521, *Muzaffar Ali Khan v. Parbati*.

(1878) 1 All 655 (658, 659), *Ali Mahammad v. Lolita Bulsh*.

(1897) 21 Bom 793 (796), *Pandu Lakshman v. Anupurna*.

(1916) A I R 1916 Lah 836 (837) : 32 Ind Cas 961, *Abdul Aziz Khan v. Kale Shah*.

(1912) 14 Ind Cas 584 (585) : 15 Oudh Cas 39, *Amir Ali v. Niaz Ali*.

(1936) A I R 1936 Lah 753 (756) : 168 Ind Cas 506, *Sher Mohammad Khan v. Chuhr Shah*.

(1929) A I R 1929 Lah 80 (81) : 118 Ind Cas 540, *Din Mohammad v. Safdar Ali*.

[But see (1924) 46 Mad L Jour 82 (83) (N R C). {Submitted not correct.}]

5. (1909) 4 Ind Cas 264 (265) (Bom), *Hanmantha Yamaji v. Gopal Sadashiv*.

in the undermentioned cases.⁶ It is submitted that such a view is not correct on principle.

Where the equity of redemption under a mortgage is transferred to the mortgagee by a person alleged to be the adopted son of the mortgagor, after the latter's death, and such alleged adoption is void, the rightful heir of the mortgagor can sue for redemption of the mortgage within the period of sixty years given by this Article, although he has not sued within the period of six years under Article 118 *supra* for a declaration that the adoption is invalid.⁷

Where the equity of redemption under a mortgage is sold to the mortgagee by the guardian of a minor mortgagor, the latter must, if he means to impeach the sale, sue to set it aside within three years of his attaining majority (see Article 44). If he fails to do so, he cannot thereafter sue to redeem the property within the longer period conferred by this Article.⁸

6. Invalid foreclosure proceedings — Effect. — Where a mortgagee, not being entitled to possession under the mortgage, takes possession of the mortgaged property as a result of foreclosure proceedings which are invalid, the possession of the mortgagee will not be in his character as mortgagee but under a claim of ownership and hence, a suit against him for the recovery of the property will not be governed by this Article.¹ But, where a mortgagee is already in possession as mortgagee, the fact that subsequent proceedings are instituted for foreclosure of the mortgage (which proceedings turn

(1923) A I R 1923 Lah 74 (74) . 68 Ind Cas 783, *Amir v. Nadir Ali*.

(1935) A I R 1935 Lah 924 (925) 160 Ind Cas 557, *Nauab v. Lachhman Singh*.

(1920) A I R 1920 Bom 20 (20) . 44 Bom 818 58 Ind Cas 39, *Kalu Deoba v. Rupchand Kishandas*.

[*See also* (1909) 5 Ind Cas 123 (124) 32 All 160, *Saiduddin Khan v. Ratan Lal*. (Purchase in execution of one co-mortgagor's interest—Possession of mortgagee not adverse to the other co-mortgagor.)]

6. (1923) A I R 1923 Oudh 50 (52) . 25 Oudh Cas 245 : 70 Ind Cas 983, *Janaka Shah v. Mohammad Abbas*

(1922) A I R 1922 Bom 1 (1) 67 Ind Cas 219, *Ibrahim Gulam Husain v. Mohideen Balhu Modali*

(1925) A I R 1925 Oudh 182 (183) 80 Ind Cas 5-2, *Ram Chhore Lalsh v. Ram Surat*

7. (1916) A I R 1916 Lah 336 (337) 32 Ind Cas 961, *Abdul Aziz Khan v. Kala Shah*

8. (1925) A I R 1925 Lah 619 (620) 89 Ind Cas 602 6 Lah 447, *Labha Mal v. Malat Ram*

(1920) A I R 1920 Bom 1 (6, 7) 44 Bom 742 . 58 Ind Cas 257 (F B), *Falavarappa Limanna v. Mahadu Lumanna*.

Note 6

1 (1928) A I R 1928 All 197 (198) 114 Ind Cas 187, *Luchi Rai v. Jagannath Sahu*.

(1926) 93 Ind Cas 934 (935) (Lah), *Jankabhai v. Anwar Chaud*

(1911) 11 Ind Cas 429 (431) (Lah), *Janki Khan v. Lalchand Chaud*.

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out to be invalid), will not convert the possession into one held as full owner.² Hence, a suit against the mortgagee for the possession of the property will be governed only by this Article notwithstanding the foreclosure proceedings.

7. Mortgage providing that on default of mortgagor in paying the mortgage money within a fixed term, he should become absolute owner of the property — Effect. — Notwithstanding a condition in a mortgage deed that on default of the mortgagor in paying the mortgage money (or interest) within a stipulated period, the mortgagee should become the absolute owner of the property, the mortgage does not come to an end on such default by the mortgagor and the possession of the mortgagee (where he is in possession) is only that of a mortgagee even after such default.¹ But where in pursuance of such a clause in the mortgage deed the mortgagor himself consents that the mortgagee should hold the property as owner from a certain date, and the mortgagee accordingly begins to hold the property as owner, his possession will not be that of a mortgagee but under a claim of full ownership.² The reason suggested is that it is open to the parties to a mortgage to agree what the character of possession to be held by the mortgagee should be from a certain date.³ In such a case, though the mortgagor's consent in the absence of a transfer of the equity of a redemption to the mortgagee cannot confer on the latter full title to the property, yet,

(1925) A I R 1925 Lah 53 (54) : 79 Ind Cas 39, *Munna Lal v. Hamid Ali*.

2. (1895) 23 Cal 228 (236, 237) : 22 Ind App 183 : 5 Mad L Jour 261 : 6 Sār 649 (P O), *Kishore Mohun Roy v. Ganga Bahu Debi*.

[See also (1903) 1903 Pun Re No. 65 : 1903 Pun L R No. 90 : 1903 Pun W R No. 113, *Indar v. Assa Singh*. (Mortgage by conditional sale—Invalid foreclosure proceedings—Mutation of names in mortgagee's favour—No adverse possession.)]

Note 7

1. (1872) 9 Bom H O R 79 (83), *Krishnaji alias Babaji Keshav v. Ravji Sadashiv*.

(1919) A I R 1919 Bom 146 (146) : 43 Bom 663 : 53 Ind Cas 164, *Bai Kanhu v. Bai Jadav*.

• (1872) 9 Bom H O R 69 (72, 78), *Shankarabhai Ghulabhai v. Kassi Bhas Vithalabhai*.

• (1923) A I R 1923 Lah 71 (72) : 68 Ind Cas 883, *Zora v. Chandu*.

(1914) A I R 1914 Lah 850 (352) : 1914 Pun Re No. 94 : 22 Ind Cas 837, *Bulaki Mal v. Duni Chand*.

2. (1914) A I R 1914 Mad 578 (579) : 16 Ind Cas 694 (695, 696) : 37 Mad 545, *Usuman Khan v. Nagalla Dasanna*.

(1922) A I R 1922 Oudh 133 (134) : 68 Ind Cas 223 : 25 Oudh Cas 83, *Dashir Hussein v. Chandra Pal Singh*.

[See also (1924) A I R 1924 Rang 290 (291) : 62 Ind Cas 829, *Mg. San Choin v. Ma Daung U*. (Mortgagee holding land as owner to knowledge of mortgagor—Mortgagee's possession is adverse to mortgagor.)]

3. (1914) A I R 1914 Mad 578 (579) : 16 Ind Cas 694 (695) : 37 Mad 545, *Uruman Khan v. Nagalla Dasanna*.

the mortgagee will acquire such title by prescription if he continues in possession for a period of twelve years under the claim of full ownership. (See Note 28 to Article 142 *ante*)

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In the undermentioned case,⁴ a mortgage provided that in case the mortgagor failed to pay the mortgage money within a certain date, the mortgagee should *take* possession of the mortgaged property in his own right. On the expiry of the fixed term, the mortgagee took possession of the property. It was held that the possession of the mortgagee was not in his capacity as mortgagee but in assertion of his full ownership to the property and so, a suit against him for the recovery of the property from him was not governed by this Article.

See also Note 5 above.

8. Mortgagee purchasing mortgaged property in contravention of Order 34 Rule 14, Civil Procedure Code — Effect. — Where a mortgagee purchases the mortgaged property in execution of a money decree for the mortgage debt, such sale is invalid under Order 34 Rule 14, Civil Procedure Code. As observed in *Khairajmal v. Daim*,¹ such a sale cannot relieve the mortgagee of his obligations as mortgagee or deprive the mortgagor of his right to redeem. But such a sale is not void. It is only liable to be *set aside* at the instance of the mortgagor. Hence, unless the sale is set aside by an application made within the period prescribed by Art. 166 *infra*, the sale would be binding on the mortgagor and he cannot thereafter sue to redeem the mortgage, ignoring the sale.² Where, however, the mortgagor gets the sale set aside by a proper application as above, the parties will continue as mortgagor and mortgagee and the mortgagor can sue for redeeming the property from the mortgagee within the period of limitation provided by this Article.

9. Void mortgage — Person entering into possession under such mortgage. — Where a mortgage is void, the possession of the mortgagee who enters into possession of the mortgaged property under such void mortgage is adverse to the mortgagor.¹ A suit by the mortgagor for the recovery of the property against such mortgagee (on the ground of the latter being merely a trespassor) will not be within this Article. Such a suit must be brought within twelve years

4. (1882) 1882 All W N 84 (85), *Bhola v. Ajudhia Prasad*.

Note 8

1. (1904) 32 Cal 296 (316) : 33 Ind App 23 : 9 Cal W N 201 : 2 All L Jour 71 : 7 Bom L R 1 : 1 Cal L Jour 564 : 8 Sar 734 (P C).
2. (1920) A I R 1920 Cal 363 (366) : 55 Ind Cas 157 : 47 Cal 377 (F B), *Uttam Chandra v. Raj Krishna*.

Note 9

1. [But see (1926) A I R 1928 All 532 (552) : 117 Ind Cas 831, *Mt. Raj Rani v. Gulab*. (The proposition in this case that the possession of the mortgagee in such cases is not adverse is not correct.)]

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from the mortgagee entering into possession.² But a person who enters into possession of a property under a void mortgage can prescribe only for a mortgagee's title to such property and not for an absolute title.³ Hence, even after the expiry of twelve years from his entering into possession, although he cannot be ejected as a trespasser, a suit can be brought against him as a mortgagee within the longer period of limitation provided by this Article.⁴

Where a person is let into possession under a void mortgage and subsequently, within the period of twelve years from his entering into possession, the property is sold to him under a void deed of sale, his possession from the date of the sale becomes one held as owner and hence, he prescribes for a full title from such sale.⁵

A mortgage of vatan property by a vatandar is valid during his lifetime but is not binding on his successors. Where a mortgagee from a vatandar enters into possession under the mortgage and continues to be in possession after the vatandar's death, it has been held that the mortgagee's possession is adverse to the successors of the vatandar from the latter's death; but the mortgagee acquires by such adverse possession against the successors, only the title of a mortgagee.⁶ As to correctness of this view, see Note 61 to Article 142 ante.

10. Extinction of mortgage by decree or order of Court. —
 The mere fact that a decree for redemption has been passed against

2. (1920) A I R 1920 Lah 300 (301) : 1 Lah 549 : 59 Ind Cas 478, *Shah Nawaz v. Sheikh Ahmad*.
3. (1924) A I R 1924 Mad 292 (294) : 47 Mad 203 : 79 Ind Cas 510, *Appamma v. Chinnaveadu*.
 (1924) A I R 1924 Mad 720 (720) : 80 Ind Cas 561, *Aiyisa Biri Ammal v. Kalandarsa Rowther*.
 (1912) 16 Ind Cas 960 (960, 961) (Mad), *Sundara Guruklal v. Subramania Archakar*.
 (1929) A I R 1929 Nag 115 (116) : 118 Ind Cas 57, *Sukhlal v. Bisesar*.
4. (1927) A I R 1927 All 311 (314) : 100 Ind Cas 316, *Maha Mangal Bai v. Kishun Kandu*.
 (1921) A I R 1921 Mad 410 (411 412) : 44 Mad 946 : 64 Ind Cas 323, *Sontynagopala Dasee v. Inaputalapula Rami*.
 (1917) A I R 1917 Oudh 116 (117) : 20 Oudh Cas 208 : 41 Ind Cas 862, *Bihari v. Adya Nath*.
 (1930) 123 Ind Cas 195 (197) (Mad), *Sayyapureddy Abbayya v. Sayam Appanna*.
 (1936) A I R 1936 Pat 63 (65) : 160 Ind Cas 1066, *Baij Nath Prasad v. Muneshwar Singh*.
 (1932) A I R 1932 All 259 (260) : 140 Ind Cas 42, *Halka v. Nannhon*.
5. (1924) A I R 1924 Mad 720 (721) : 80 Ind Cas 561, *Aiyisa Biri Ammal v. Kalandarsa Rowther*.
 (1925) A I R 1925 Mad 1020 (1020, 1021) : 86 Ind Cas 433, *Aiyisa Biri Ammal v. Kalandarsa Rowther*.
 [But see (1926) A I R 1926 Mad 377 (377) : 93 Ind Cas 955, *Butchi Raju v. Seetharamayya*.]
- 6 (1915) A I R 1915 Bom 131 (131) : 39 Bom 587 : 30 Ind Cas 390, *Ramchandra Venkaji v. Kollo Decji*.

a mortgagee does not alter his character as mortgagee and a second suit for redemption against him (assuming such a suit to be maintainable) is only a suit against a mortgagee and so is governed by this Article.¹

11. Effect of proceedings under Bengal Regulation, 17 of 1806. — See the undermentioned cases.¹

12. Abandonment of land by mortgagor.—Where a mortgagor sues for the redemption of the mortgaged land within the period of limitation prescribed by this Article, the suit is maintainable although the land had previously been abandoned by the plaintiff.¹

13. Adverse possession by stranger.—See Notes 84 and 85 under Article 142, *ante*.

14. "To redeem or to recover possession." — See Note 1a above. Where a dispute as to the amount due on a mortgage is referred to arbitration and the arbitrators decide what the amount is and also that the mortgagees should be in possession for a certain number of years, a suit for redemption by enforcing the award

Note 10

1. (1923) A I R 1923 Bom 300 (300, 301) : 47 Bom 692 : 72 Ind Cas 556, *Hanmantha v. Shidu Sambhu*.
- (1892) 15 Mad 366 (370, 371), *Ramunni v. Brahma Dattan*.
- (1909) 4 Ind Cas 939 (940) (Lah), *Mohan v. Dialu*.
- (1918) A I R 1918 Bom 1 (12) : 49 Ind Cas 894 : 43 Bom 334 & 477 (F B), *Ramji Bapuji v. Pandharimath Ravji*.
- [But see (1870) 13 Suth W R 78 (80), *Ram Surun Singh v. Mahomed Ameer*]

Note 11

1. (1914) A I R 1914 All 242 (246) : 25 Ind Cas 611, *Mt. Zashunnissa v. Par-*

his suit, the possession of the mortgagee ceased to be that of mortgagee and subsequent suit against him came within Article 141.)

- (1923) A I R 1923 Nag 274 (277) : 72 Ind Cas 121, *Rupabai v. Rodba*. (Mortgagee issuing notice of foreclosure under the Regulation, but not taking any further proceedings after the year of grace allowed by the notice — Relationship of mortgagor and mortgagee does not change and the subsequent possession of the mortgagee is not adverse to the mortgagor.)
- (1900) 1900 Pan L R 167 (169), *Sula Khan v. Nanak Singh*. (Suit for redemption of a mortgage by way of conditional sale — Regulation 17 of 1806 — Irregular proceedings — Effect of — Mortgagor can redeem within period prescribed by Article 148.)

Note 12

1. (1917) A I R 1917 Lah 461 (462) : 86 Ind Cas 221, *Md. Chiragh Shah v. Choghalla*. (No question of abandonment can arise before expiry of limitation in such cases.)

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would be governed by this Article.¹

Where a person is made to sign a document by misrepresentation that it is only a *mortgage* deed, while, in fact, it is a *sale* deed, a suit by such person for the redemption of the mortgage on the ground that the sale under such circumstances is void, is governed by this Article and not by Article 91.² The reason is that a void document need not be set aside and Article 91 does not apply to such cases (see Note 3 to Article 91 *supra*).

See also the undermentioned case.³

15. Claim for surplus profits — Limitation. — See Notes under Article 105, *supra*.

16. Accessions to mortgaged property. — An accession to mortgaged property to which the mortgagor is entitled on redemption is not property *mortgaged*, and hence, the mortgagor's suit for such an accession is not governed by this Article.¹

17. "Immoveable property." — For the meaning of the expression "immoveable property," see Article 3, Note 4; Article 132, Note 19 and Note 6 to Article 142, *supra*.

A grove of *mahua* trees¹ and the right to officiate as priest² have been held to be "immoveable property" for the purpose of this Article.

18. Starting point of limitation. — Subject to the proviso contained in the third column of the Article, the period of limitation under this Article begins to run from the time when the right to redeem or to recover possession accrues.

Note 14

1. (1923) A I R 1923 Rang 103 (109) : 70 Ind Cas 517 : 4 Upp Bur Rul 124, *Maung Ne Dun v. Maung Cho*.
2. (1912) 18 Ind Cas 375 (376) (Upp Bur), *Nga Paw v. Nga Lu Gale*.
8. (1923) A I R 1923 Rang 232 (233, 236) . 76 Ind Cas 624, *Ma Hin Tha v. Ma Thet Su*. (Law in British Burma prior to introduction of Transfer of Property Act in 1922 — When in the case of a mortgage containing a forfeiture clause the mortgagor offers to redeem the mortgage within the period fixed but the mortgagee refuses redemption and the mortgagor brings a suit for the purpose, the suit may be regarded as one for *specific performance* and limitation for the suit is three years from the date on which redemption was refused.)

Note 16

1. (1917) A I R 1917 Lah 430 (432) : 42 Ind Cas 468, *Khuda Dad Khan v. Girdhars Ram*.

Note 17

1. (1925) A I R 1925 Oudh 109 (108) . 81 Ind Cas 650, *Chand v. Sat Narain*.
2. (1883) 10 Cal 73 (74) : 13 Cal L R 263 : 8 Ind Jur 197, *Raghoo Pandey v. Kassy Parey*.
 [See also (1903) 1903 Pun Re No. 34 : 1903 Pun W R No. 96 : 1903 Pun L R No. 163, *Mohan Lal v. Janli*.]

Section 60 of the Transfer of Property Act provides as to when the right to *redeem* a mortgage accrues. The right accrues when the mortgage money has become "due." Before the amendment of the Section by Act 20 of 1929, the word used in the Section was "payable." Nevertheless, it was generally held that when a period was fixed for the payment of mortgage money, the right to redeem accrued only after the expiry of the period and not before,¹ except where there was a special contract providing to the contrary.^{1a} This

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Note 18

1. (1914) A I R 1914 P C 36 (37) : 36 All 195 : 41 Ind App 84 : 23 Ind Cas 355 (P C), *Bakhtawar Begum v. Husain Khanum*.
(1877) 2 Mad 45 (45) : 3 Ind Jur 64, *Keshava v. Keshava*.
(1889) 1889 All W N 187 (189), *Kamla Kuer v. Har Sahas*.
(1889) 1889 All W N 135 (136), *Maharaja of Benares v. Sita Ram Naik*.
(1907) 29 All 471 (473, 474) : 4 All L Jour 375 : 1907 All W N 133, *Husan Begam v. Collector of Cawnpore*.
(1886) 8 All 95 (98) : 1886 All W N 13, *Raghubar Dayal v. Budhu Lal*.
(1869) 6 Bom H O R A O 121 (123), *Sitaram Dandekar v. Ganesh Gokhale*.
(1925) A I R 1925 Lah 529 (529) : 86 Ind Cas 859, *Chiman Lal v. Ram Rika*.
(1935) 158 Ind Cas 409 (409), 16 Lah 440 (441), *Mohamed Hasan v. Chandu Ram*.
(1925) A I R 1925 Cal 662 (863, 865) : 86 Ind Cas 353, *Mohini Mohan v. Sarat Sundari Devi*.
(1877) 2 Mad 314 (316) : 4 Ind Jur 500, *Setrucherla Ramabhadra Raju v. Vairucherla Suryanarayana Raju*.
(1910) 8 Ind Cas 707 (708) (Cal), *Ram Tarak v. Ashutosh*.
(1926) A I R 1926 Oudh 552 (552) : 97 Ind Cas 919, *Shian Manohar v. Husain*.
(1925) A I R 1925 Nag 11 (14) : 79 Ind Cas 870, *Rama v. Wamanrao*.
(1921) A I R 1921 Nag 22 (23) : 17 Nag L R 202 : 64 Ind Cas 730, *Bala v. Ghasi*.
(1916) A I R 1916 Mad 940 (940) : 30 Ind Cas 870, *Chandu v. Kojja Poojari*.
(1915) A I R 1915 Mad 425 (425) : 25 Ind Cas 576, *Mir Mahamad Rowther v. Nagoor Rowther*.
(1892) 16 Mad 486 (489) : 2 Mad L Jour 272, *Tirugunana Sambanda Pandara Sannadhi v. Nallatambi*.
(1910) 8 Ind Cas 1068 (1069) (Mad), *Muhammed Ibrahim v. Muhammed Asw*.
(1912) 15 Ind Cas 287 (288) : 39 Cal 828, *Purna Chandra v. Peary Mohan*.
(1874) 11 Bom H O R 283 (286), *Lalla Morji v. Vasudev Moreshwar*.
(1866) 2 Bom H O R 225 (231) : 1 Ind Jur (N S) 250, *Salharam Narasimha v. Vithu Laka Gouda*.
(1925) 90 Ind Cas 763 (764) (Cal), *Mahommed Ismail v. Sharfatulla*.
(1909) 2 Ind Cas 160 (181) : 31 All 300, *Kalka Prasad v. Bhuiyan Din*.
(But see (1889) 10 All 602 (610) : 1888 All W N 263, *Bhagwat Das v. Parshad Singh*.
(1919) A I R 1919 Oudh 335 (356) : 51 Ind Cas 650, *Anant Lam v. Kalua*.)
- 1a. (1867) 8 Mad H O R 363 (365), *Dorappa v. Mallikarjunudu*.
(1906) 16 Mad L Jour 146 (147, 148), *Chinnaswamy Reddiar v. Krishna Reddy*.

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view proceeded on the ground that the right to redeem and the right to foreclose (or sell) are co-extensive and arise simultaneously; so that, if the mortgagee has no right to sue for the mortgage money, the mortgagor also can have no right to sue for the redemption of the mortgage. This view has been made clear by the amendment of Section 60 above referred to, so that where a mortgage deed provides a period for the payment of the mortgage money, the mortgagor's right to redeem the mortgage will arise only *after* the expiry of the period and not before, inasmuch as before the expiry of such period, the mortgage money would not be "due" in the sense that the mortgagee could sue to recover it.²

In the undermentioned case,³ a mortgage deed provided that if the mortgagor paid the mortgage money in the month of any *Jeth* within ten years, the mortgage would be redeemed but that if he failed to redeem within ten years, the mortgagee would become its owner. It was held by the Allahabad High Court that the mortgagor's right to redeem under the above mortgage deed arose in the first *Jeth* succeeding the date of the mortgage and a suit for redemption instituted more than sixty years after the first *Jeth* would therefore be barred by limitation. It is submitted that the correctness of the decision is doubtful in view of the express language of Section 60 of the Transfer of Property Act under which the right to redeem accrues only on the mortgage money becoming *due*.

Even where the time fixed for redemption under a mortgage deed is very long after the date of the mortgage, the right of redemption cannot arise before, unless the clause fixing the term of the mortgage is held to be a clog on the equity of redemption, or is, for some other reason, held not binding on the mortgagor.⁴

Where no date is fixed in a mortgage deed for payment of the mortgage money, the money becomes due immediately on the execution of the deed and consequently, the right to redeem also accrues immediately on the execution of the deed.⁵

(1908) 18 Mad L Jour 235 (236), *Vishvendra Thirthaswami v. Vishnumurthi Dhatta*.

(1916) A I R 1916 Mad 940 (940) : 30 Ind Cas 370, *Chandu v. Koaja Poojari*.

(1896) 20 Bom C77 (687), *Sayad Abdul Hal v. Gulam Jilani*.

[See (1912) 15 Ind Cas 287 (288) : 39 Cal 828, *Purna Chandra v. Feary Mohan*]

2. (1932) A I R 1932 All 155 (156) : 184 Ind Cas 459, *Akbar Husain v. Shah Ahsanul Hug*.

(1936) A I R 1936 Oudh 180 (181) : 159 Ind Cas 1052, *Har Bakhsh Singh v. Mahabir Singh*.

3. (1937) A I R 1937 All 82 (83, 84, 85) : 166 Ind Cas 478, *Dagesicari Tewari v. Nandoo Singh*.

4. (1861) 8 Mad H C R 363 (367), *Dorappa v. Mallikarjunudu*.

(1912) 15 Ind Cas 850 (881) (All), *Ram Prasad v. Jagrup*.

5. (1918) 19 Ind Cas 291 (296) : 33 All 227 : 40 Ind App 74 (P C), *Soni Ram v. Kanhaiyalal*.

Under Section 62 of the Transfer of Property Act, where a usufructuary mortgagee is authorised to pay himself the mortgage money from the rents and profits of the property, the right of the mortgagor to recover possession of the property accrues when the mortgage money is so paid.⁶ In such cases, even where a term is fixed for the mortgage and the mortgage is discharged out of the usufruct of the mortgaged property *before the expiry of such term*, the mortgagor can recover possession on the discharge of the mortgage debt and hence, limitation under this Article begins to run from the date when the mortgage debt is so discharged.⁷

In the case of *lekha mukhi* mortgages in the Punjab, it has been held that the period of limitation for a suit for redemption runs from the date of the mortgage.⁸

See also the undermentioned cases.⁹

19. This Article and Article 134.— This Article applies not only to a suit against a mortgagee but also to one against an assignee of the mortgagee's rights. Suppose, a mortgagee in possession of the mortgaged property transfers the property to a third person for consideration, professing to be the *absolute* owner of the property, and the transferee takes possession of the property under such transfer. In such a case, notwithstanding the misrepresentation of the mortgagee-transferor, the transferee would, under the law, only get the rights of the *mortgagee* in the property and not rights of full ownership. In other words, such a transferee would only be an assignee of the rights of the mortgagee. But, in such cases, there is a *special* period of limitation provided by Article 134 *supra* for a suit

(1928) 110 Ind Cas 560 (560) (All), *Markunday v Mahabir Pandey*.

(1919) A I R 1919 Lah 20 (20) 51 Ind Cas 956 · 1 Lah 89, *Khandu Lal v. Fazal*.

(1925) 90 Ind Cas 763 (764) (Cal), *Mahammed Isami v Sharfatulla*.

6. (1892) 16 Mad 486 (488) · 2 Mad L Jour 272, *Tirugnana Sambandha Pandara Sannadhi v Nallatambi*.

(1915) A I R 1915 Mad 481 (483) 25 Ind Cas 797, *Dorayya v. Ayyama-charyulu*.

[See also (1928) A I R 1928 Mad 234 (236) 108 Ind Cas 277, *Venkataramanamma v B. Simon*]

7. (1914) A I R 1914 P C 36 (38) 36 All 195 41 Ind App 84 23 Ind Cas 355 (P C), *Mt Bakhtawar Begam v. Husam Khanum*.

(1918) A I R 1918 Oudh 432 (434) 47 Ind Cas 161, *Prag v. Mohanlal*.

8 (1927) A I R 1927 Lah 828 (830) · 101 Ind Cas 549, *Dattu Mal v. Ilahi Baksh*

(1919) A I R 1919 Lah 20 (21) · 51 Ind Cas 956, *Khandu Lal v. Fazal*.

9. (1930) A I R 1930 Oudh 270 (271) 122 Ind Cas 769 : 5 Luck 684, *Rugghu Singh v. Deputy Commissioner, Sitapur*. (Mortgage without possession—Provision in mortgage that if amount due is not paid by end of 1848, mortgagor will lose all right in property and will deliver possession to mortgagee — Possession delivered in 1852 without paying amount due — Suit for redemption in 1928 — Suit held barred by

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view proceeded on the ground that the right to redeem and the right to foreclose (or sell) are co-extensive and arise simultaneously; so that, if the mortgagee has no right to sue for the mortgage money, the mortgagor also can have no right to sue for the redemption of the mortgage. This view has been made clear by the amendment of Section 60 above referred to, so that where a mortgage deed provides a period for the payment of the mortgage money, the mortgagor's right to redeem the mortgage will arise only *after* the expiry of the period and not before, inasmuch as before the expiry of such period, the mortgage money would not be "due" in the sense that the mortgagee could sue to recover it.²

In the undermentioned case,³ a mortgage deed provided that if the mortgagor paid the mortgage money in the month of any *Jeth* within ten years, the mortgage would be redeemed but that if he failed to redeem within ten years, the mortgagee would become its owner. It was held by the Allahabad High Court that the mortgagor's right to redeem under the above mortgage deed arose in the first *Jeth* succeeding the date of the mortgage and a suit for redemption instituted more than sixty years after the first *Jeth* would therefore be barred by limitation. It is submitted that the correctness of the decision is doubtful in view of the express language of Section 60 of the Transfer of Property Act under which the right to redeem accrues only on the mortgage money becoming *due*.

Even where the time fixed for redemption under a mortgage deed is very long after the date of the mortgage, the right of redemption cannot arise before, unless the clause fixing the term of the mortgage is held to be a clog on the equity of redemption, or is, for some other reason, held not binding on the mortgagor.⁴

Where no date is fixed in a mortgage deed for payment of the mortgage money, the money becomes due immediately on the execution of the deed and consequently, the right to redeem also accrues immediately on the execution of the deed.⁵

(1908) 18 Mad L Jour 235 (236), *Vishuendra Thirthaswami v. Vishnu-murthi Bhatta*.

(1916) A I R 1916 Mad 940 (940) : 30 Ind Cas 370, *Chandu v. Kooja Poojari*.

(1896) 20 Bom 677 (687), *Sayad Abdul Hal v. Gulam Jilani*.

[See (1912) 15 Ind Cas 237 (238) : 39 Cal 828, *Purna Chandra v. Peary Mohan*.]

2. (1932) A I R 1932 All 155 (156) : 131 Ind Cas 459, *Akbar Husain v. Shah Ahsanul Hug*.

(1936) A I R 1936 Oudh 130 (131) : 159 Ind Cas 1052, *Har Bakhsh Singh v. Mahabir Singh*.

3. (1937) A I R 1937 All 32 (33, 34, 35) : 166 Ind Cas 473, *Dageswari Tewari v. Nandoo Singh*.

4. (1867) 3 Mad H O R 363 (367), *Dorappa v. Mallikharjunudu*.

(1912) 15 Ind Cas 880 (881) (All), *Ram Prasad v. Jagrup*.

5. (1913) 19 Ind Cas 291 (296) : 35 All 227 : 40 Ind App 74 (P C), *Soni Ram v. Kanhaiyalal*.

Under Section 62 of the Transfer of Property Act, where a usufructuary mortgagee is authorised to pay himself the mortgage money from the rents and profits of the property, the right of the mortgagor to recover possession of the property accrues when the mortgage money is so paid.⁶ In such cases, even where a term is fixed for the mortgage and the mortgage is discharged out of the usufruct of the mortgaged property *before* the expiry of such term, the mortgagor can recover possession on the discharge of the mortgage debt and hence, limitation under this Article begins to run from the date when the mortgage debt is so discharged.⁷

In the case of *lekha mulki* mortgages in the Punjab, it has been held that the period of limitation for a suit for redemption runs from the date of the mortgage.⁸

See also the undermentioned cases⁹

19. This Article and Article 134. — This Article applies not only to a suit against a mortgagee but also to one against an assignee of the mortgagee's rights. Suppose, a mortgagee in possession of the mortgaged property transfers the property to a third person for consideration, professing to be the *absolute* owner of the property, and the transferee takes possession of the property under such transfer. In such a case, notwithstanding the misrepresentation of the mortgagee-transferor, the transferee would, under the law, only get the rights of the *mortgagee* in the property and not rights of full ownership. In other words, such a transferee would only be an assignee of the rights of the mortgagee. But, in such cases, there is a *special* period of limitation provided by Article 134 *supra* for a suit

(1928) 110 Ind Cas 560 (560) (All), *Markunday v. Mahabir Pandey*

(1919) A I R 1919 Lah 20 (20) . 51 Ind Cas 956 1 Lah 89, *Khandu Lal v. Fazal*.

(1925) 90 Ind Cas 763 (764) (Cal), *Mahammed Ismail v. Sharfatulla*.

6. (1932) 16 Mad 486 (486) : 2 Mad L Jour 272, *Tirugnana Sambandha Pandara Sannadhi v. Nallatambi*.

(1915) A I R 1915 Mad 481 (483) : 25 Ind Cas 797, *Dorayya v. Ayyama-charyulu*.

[See also (1928) A I R 1928 Mad 234 (236) 108 Ind Cas 277, *Venkataramanamma v B. Simon*]

7. (1914) A I R 1914 P C 36 (38) 36 All 195 41 Ind App 84 23 Ind Cas 355 (P C), *Mt. Bakhtawar Begam v Husaini Khanum*.

(1918) A I R 1918 Oudh 432 (434) . 47 Ind Cas 161, *Frag v. Mohanlal*

8 (1927) A I R 1927 Lah 828 (830) : 101 Ind Cas 549, *Dattu Mal v. Ilahi Baksh*

(1919) A I R 1919 Lah 20 (21) . 51 Ind Cas 956, *Khandu Lal v. Fazal*.

9. (1928) A I R 1928 O. 11 277 278.

for possession against the transferee, and this Article will not, therefore, apply.

The view is sometimes expressed that where a mortgagee transfers the mortgaged property professing to be the owner thereof, the transferee is not a transferee of the *mortgagee-interest* and hence, this Article does not apply to a suit for possession or redemption against such a transferee.¹ It is submitted that such a view is not correct, for whatever the professions of the mortgagee, the transferee can get in such a case only the rights of a *mortgagee*. The reason for the non-applicability of this Article to a suit against such a transferee is not that he is something more than a transferee of the *mortgagee-interest* in the property but that there is a different Article which *specially* provides for such cases. In the undermentioned case,² it was observed that the object of Article 134 was "to cut down the period available to the mortgagor under Article 148 and to compel him to watch the conduct of the mortgagee and intervene on a transfer, thus making the transfer a cause of action which otherwise did not exist." It is submitted, with respect, that the view as to Article 134 *creating* a cause of action which otherwise did not exist is not correct. The Limitation Act does not *create* a cause of action. The object of the Act is only to provide the period of time before the expiry of which the cause of action must be enforced. (See Section 3 Note 2 *supra*.)

A transferee from a mortgagee, who has professed to act as the full owner of the property, gets at least the rights of the mortgagee in the property.³ Hence, although Article 134 speaks of a suit for *possession*, where anything remains due on the mortgage, the Article can only mean a suit for possession on redemption of the mortgage,⁴ for the simple reason that a suit for possession *simpliciter* without

Article 148 as right to redeem accrued on execution of mortgage—Suit was barred even if the right accrued in 1852)

land would be released—No date for redemption fixed in deed — Held on construction of deed that right of redemption did not accrue till the mortgagee got possession under the deed)

Note 19

1. (1926) A I R 1926 Oudh 547 (548) : 29 Oudh Cas 353 : 97 Ind Cas 874 : 1 Luck 423 (F B), *Srs Ram v. Najibullah*.
(1921) A I R 1921 All 389 (390, 391) : 43 All 164 : 61 Ind Cas 546, *Mt. Ram Piar v. Budh Sen*.
2. (1921) A I R 1921 Mad 272 (276) : 44 Mad 951 : 69 Ind Cas 734, *Narayana-swamy Naicker v. Periaswamy Odayar*.
3. (1921) A I R 1921 Mad 272 (275) : 44 Mad 951 : 69 Ind Cas 734, *Narayana-swamy Naicker v. Periaswamy Odayar*.
4. See (1927) A I R 1927 All 807 (810) : 102 Ind Cas 135, *Lakshmi Das v. Mt. Badia*, (Article 134 applies to suit for redemption.)

offering to redeem the mortgage will not lie at all against the transferee in such cases. The cause of action for such a suit against the transferee is the same as that against the mortgagee himself, and such cause of action is not accelerated simply because the mortgagee has transferred his rights to another, professing to have full rights to the mortgaged property. Hence, where the right to redeem the mortgage has not arisen, the mortgagor cannot sue the transferee for redemption, notwithstanding the transfer by the mortgagee in the professed exercise of rights of *ownership* over the property.

Suppose, the right to redeem the mortgage arises *after* the mortgagor comes to know of the transfer by the mortgagee (the time mentioned in Article 134 as the starting point of limitation under the Article). The question arises whether Article 134 will apply to such cases. There does not seem to be any decided case on this point. But it is conceived that Article 134 will not apply to such cases. The reason is that limitation cannot begin to run before the accrual of the cause of action, and the Articles in the Limitation Act must be read subject to this principle, so that if at the time mentioned in the third column of any Article the cause of action for a suit (falling within the description contained in the first column) has not arisen, the Article must be held inapplicable to the case. (See Notes to Section 9 *ante*.) It is conceived that in such a case Article 148 will apply.

Where, in a suit against a transferee from a mortgagee for the recovery of the mortgaged property, the defendant contends that the suit is governed by the shorter period of limitation under Article 134 and not by this Article, it is for the defendant to prove the facts which would bring the case within Article 134.⁵

20. This Article and Article 126.—Where a Hindu son sues to *set aside* a mortgage of joint family property executed by his father and not to redeem the mortgage, the Article applicable is Article 126 *supra* and not this Article.¹

Where a Hindu executes a usufructuary mortgage of joint family property and then sells the equity of redemption to the mortgagee, the sons will lose their right to the property altogether if they do not sue to set aside the sale within the period of twelve years under

(1926) A I R 1926 Oudh 547 (548) 29 Oudh Cas 353 · 97 Ind Cas 574 · 1 Luck 423 (F B), *Sri Ram v. Najibullah*. (Do)

[But see (1925) A I R 1925 Rang 140 (142) 2 Rang 561 · 84 Ind Cas 984, *Ma Myat Gyi v. Ma Ma Nyan* (Article 134 does not apply to suit for redemption — Submitted, decision is not correct)]

5. (1881) 1681 All W N 122 (122), *Kamta Prasad v. Bakar Ali*

Note 20

1. (1921) A I R 1921 Oudh 196 (197, 198) 21 Oudh Cas 330 : 64 Ind Cas 757, *Chokley Singh v. Hardeo Singh*.

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20-21.

Article 126. Hence, where the sons have not sued to set aside the sale within the period of twelve years under Article 126, they cannot sue to redeem the property, taking advantage of the longer period of limitation allowed by this Article.²

21. Suit by puisne mortgagee for redemption of prior mortgage. — This Article applies to a suit for redemption of a mortgage by whomsoever such suit may be brought. In other words, the Article is not confined to suits by the original mortgagor. Thus, the Article applies to a suit by a puisne mortgagee to redeem a prior mortgage.¹

Where a prior mortgagee sues to enforce his mortgage without impleading the puisne mortgagee and the latter thereafter sues to redeem the prior mortgage, there is a conflict of decisions as to whether this Article will apply to the suit. One view is that this Article will apply to such a suit² and the other view is that such a suit is really one to enforce the puisne mortgage and so is governed by Article 132 *supra* and not by this Article.³ It is submitted that the latter view is not correct, there being a clear distinction between the puisne mortgagee's right to enforce his own mortgage and his right to redeem a prior mortgage.

2. (1928) 112 Ind Cas 151 (152) (Oudh), *Kailash Singh v. Balbhaddar Singh*.

Note 21

1. (1933) A I R 1933 Lah 503 (504) : 14 Lah 596 : 142 Ind Cas 805, *Sundar Das v. Beli Ram*.

(1935) A I R 1935 Oudh 189 (140) : 10 Luck 531 : 153 Ind Cas 808, *Ram Adhar v. Shankar Balhsh Singh*.

(1929) A I R 1929 Cal 609 (611) : 119 Ind Cas 195 : 57 Cal 704 (F B), *Sayamal Molla v. Anisuddin Molla*. (Puisne mortgagee suing on his mortgage without impleading the prior mortgagee and purchasing the property himself can sue the prior mortgagee for redemption and to such a suit this Article will apply.)

.. .. . Nag 367 : 172 Ind Cas 289,
 (Prior mortgagee foreclosing
 by puisne mortgagee within

sixty years not barred though after twelve years from prior mortgagee getting possession under foreclosure decree.)

2. (1934) A I R 1934 All 946 (947) : 153 Ind Cas 664, *Narotam Das v. Sanwal Das*.

(1923) A I R 1923 All 271 (273) : 79 Ind Cas 498 : 45 All 268, *Prisya Lal v. Bohra Champa Ram*.

(1926) A I R 1926 Pat 337 (339) : 5 Pat 513 : 94 Ind Cas 281, *Ramjhar Koer v. Kashi Nath Sahai*.

(1937) A I R 1937 Nag 205 (207) : I L R (1937) Nag 367 : 172 Ind Cas 289, *Mt. Ramkunarbai v. Mt. Chitla Bai*.

3. (1926) A I R 1926 Cal 560 (560) : 91 Ind Cas 719, *Nil Madhab Mahapatra v. Joy Gopal Mahanti*.

(1909) 5 Ind Cas 877 (878) (Cal), *Nidhiram Bandopadhyaya v. Sarbessur Biswas*.

(1923) A I R 1925 Mad 76 (77, 78) : 84 Ind Cas 301, *Lakshmanan Chettiar v. Sellamuthu Naicker*.

22. Suit by execution purchaser of equity of redemption.—Where the equity of redemption under a usufructuary mortgage is sold in execution of a decree against the mortgagor, a suit by the purchaser in execution for redemption and possession of the mortgaged property is governed by this Article and not by Article 137 *supra*.¹

23. Burden of proof.—The burden of proving that the mortgage is a subsisting one and that the suit for redemption is not barred by limitation, is on the plaintiff.¹

24. Laches of mortgagor.—The laches of a mortgagor in taking no steps for many years to enforce his alleged rights may afford

Note 22

1. (1889) 1889 All W N 135 (135, 136), *Maharajah of Benares v. Sita Ram Naisk*.

Note 23

1. (1933) A I R 1933 All 21 (24) . 141 Ind Cas 91 54 All 975, *Jauhari v. Tunday*.
(1916) A I R 1916 All 201 (205) 36 Ind Cas 452 38 All 540, *Khial Ram v. Taik Ram*
(1914) A I R 1914 All 512 (518) 25 Ind Cas 353, *Frank Hay v. Rafsuddin*.
(1918) 20 Ind Cas 29 (30) (All), *Ganesh Lal v. Basanti Lal*.
(1889) 11 All 438 (443) : 1889 All W N 155, *Parmanand Misr v. Sahib Ali*.
(1886) 8 All 295 (300) . 1886 All W N 98, *Nura Bibi v. Jagat Narain*.
(1898) 1893 All W N 30 (39), *Rani v. Amir Bakhsh*.
(1905) 1905 All W N 14 (15) : 2 All L Jour 62, *Musafir Rai v. Mt. Lagan Baria Kuar*.
(1935) A I R 1935 Lah 515 (516) . 155 Ind Cas 576, *Sher Mohammed v. Karam Chand*
(1925) A I R 1925 Lah 632 (633) . 89 Ind Cas 788, *Ahmad Khan v. Muzrafer Khan*.
(1924) A I R 1924 Lah 484 (485) . 78 Ind Cas 617, *Piroze Khan v. Kanhiya Ram*.
(1923) A I R 1923 Lah 219 (220) . 71 Ind Cas 577, *Sri Ram v. Matwala Ram*.
(1919) A I R 1919 Lah 20 (22) . 1 Lah 89 51 Ind Cas 956, *Khandu Lal v. Fazal*.
(1894) 1894 Pun Re No 53, *Ghulam Hassan v. Haji Muhammad*.
(1893) 1893 Pun Re No 38, *Rahia Ram v. Radha Ram*
(1902) 26 Mad 34 (36) 12 Mad L Jour 101, *Ittappan Kuthirattat Nayer v. Nannu Sastry*.
(1918) 20 Ind Cas 63 (64, 65) (Oudh), *Gajraj Singh v. Muhammad Baker Ali Khan*.
(1918) 18 Ind Cas 229 (232) (Oudh), *Sarju Prasad v. Manni Lal*.
(1917) A I R 1917 Oudh 124 (125) . 42 Ind Cas 119, *Didar Husain v. Gaya-prasad*.
(1934) A I R 1934 Pat 615 (616) 183 Ind Cas 761, *Mt. Khuro Kuer v. Syed Noorul Hussain*.
(1921) 63 Ind Cas 490 (492) (All), *Harimurat v. Ramhit*.
(1926) 95 Ind Cas 945 (945) (Oudh), *Binda v. Sanhata Prasad*.
(1918) 20 Ind Cas 29 (30) (All), *Ganesh Lal v. Basanti Lal*.

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24—27.

evidence against the existence of those rights, but cannot estop him from asserting them, if they do exist, at any time within the period of sixty years allowed by this Article.¹

See also Note 40 to Section 3, *ante*.

25. Effect of bar of limitation.— Where a suit for recovery of possession of the mortgaged property from the mortgagee is barred under this Article, the right of the mortgagor to the property is extinguished under Section 28 *ante*, and the mortgagee becomes the owner of the property.¹

26. Special or local law.— See the undermentioned decisions.¹

27. Punjab Redemption of Mortgages Act, 2 of 1913 — Dismissal of application for redemption under — Effect.— See under Note 2 to Article 14 *supra*.

Note 24

1. (1875) 23 Suth W R 99 (101) : 14 Beng L R 386 : 2 Ind App 48 : 3 Sar 419 : 8 Suther 61 (P O), *Juggernath Sahoo v. Shah Mahomed Hossein*.
- (1896) 23 Cal 228 (286, 287) : 22 Ind App 183 : 5 Mad L Jour 261 : 6 Sar 649 (P O), *Kishore Mohun Roy v. Ganga Bahu Debi*.

Note 25

1. (1925) A I R 1925 Bom 339 (340) : 87 Ind Cas 699, *Induras Dhauras v. Shivalal Nabkubhai*.
- (1933) A I R 1933 All 21 (24) : 141 Ind Cas 91 : 54 All 975, *Jauhars v. Tunday*.

Note 26

1. (1882) 6 Bom 734 (736), *Dabaji v. Yathu*. (Under the Dekkan Agriculturists Relief Act, XVII of 1879, the mortgagor may redeem before the expiry of the term.)
- (1930) A I R 1930 Oudh 270 (271) : 122 Ind Cas 769 : 5 Luck 684, *Rugghu Singh v. Deputy Commissioner, Sitapur*. (In order to take advantage of Section 6 of the Oudh Estates Act the mortgage must have been executed on or after 18th February 1844, and then too the advantage is available in two cases only namely, in mortgages which fixed no term within which the property comprised might be redeemed or mortgages which fixed the term within which the property comprised might be redeemed if such term has not expired before the 13th February 1856.)
- (1927) A I R 1927 Oudh 457 (464) : 105 Ind Cas 93, *Suraj Bakhsh v. Ganga Bakhsh*. (A suit for redemption resting on an instrument of mortgage of the year 1849 in which no term was fixed for redemption, or if any

<p>149.* Any suit by or on behalf of the Secretary of State for India in Council, the Secretary of State, the Crown Representative, the Central Government or any Provincial Government, except a suit before a Federal Court in the exercise of its original jurisdiction.</p>	<p>Sixty years.</p>	<p>When the period of limitation would begin to run under this Act against a like suit by a private person.</p>	<p>Article 149</p>
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Synopsis

1. Legislative changes.
2. Scope of Article.
3. Applicability of Limitation Act to Government—General.
4. Suit by or on behalf of the Government — Illustrative cases.
5. Suit by manager of religious endowment.
6. Suit by Municipality.
7. Article not applicable to suit by person deriving title from Government.
8. Resumption or assessment of lakhiraj grants—Right of Government, whether extinguished by bar of limitation.
9. Acquisition of title by adverse possession against Government.
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Other Topics

Adverse possession against Government—Onus of proof .. See Note 9, Pts. 4 to 6
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 See Note 2, Pt. 1
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* Act of 1877

<p>149 — Any suit by or on behalf of the Secretary of State for India in Council</p>	<p>Sixty years</p>	<p>When the period of limitation would begin to run under this Act against a like suit by a private person</p>
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Act of 1871

<p>150 — Any suit in the name of the Secretary of State for India in Council.</p>	<p>Sixty years.</p>	<p>When the right to sue accrued.</p>
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Act of 1859

See Note 1, Legislative Changes. The Bengal Regulation referred to in the Note was repealed by Act 8 of 1868.

Article 149
Notes
1—2

1. Legislative changes.

1. Under some of the Regulations that were in force prior to the Act of 1859, such as the Bengal Regulation 2 of 1805, suits in regard to public rights were exempt from the ordinary period of limitation and a special period of limitation of sixty years was provided in regard to such suits.¹
2. Section 17 of Act 14 of 1859 provided as follows :—
“This Act shall not extend to any public property or right, nor to any suits for the recovery of the public revenue or for any public claim whatever, but such suits shall continue to be governed by the laws or rules of limitation now in force.”
3. Article 150 of the Act of 1871 provided for suits “in the name of the Secretary of State for India in Council.” The period of limitation for such suits was sixty years and time began to run under the Article from the date when the right to sue accrued.
4. In Article 149 of the Acts of 1877 and 1908, the words “in the name of the Secretary of State for India” were replaced by the words “by or on behalf of the Secretary of State for India.” The starting point of limitation was altered as the time when the period of limitation would begin to run under the Act against a like suit by a private person.
5. The words “the Secretary of State . . . Provincial Government” were added by the Government of India (Adaptation of Indian Laws) Order, 1937. The words “except a suit before a Federal Court. . . . original jurisdiction” were added by Act 14 of 1937.

2. Scope of Article.—The Article applies only to *suits* by or on behalf of the Government. It does not apply to *applications* and

Article 149 — Note 1

1. See the following cases decided under such Regulations
(1866) 6 Suth W R P C 3 (9) · 2 Moo Ind App 390 (P C), *Jewan Doss Sahoo v Shah Kubeerood-deen*. (Bengal Regulation 2 of 1805, Sec. 2.)
(1868) 10 Suth W R 76 (77) · 1 Beng L R A C 34, *Assoo Meah v. Rojoo Meah*. (Case decided under S. 17 of Act of 1859 under which the Regulations in force at the date of the Act continued to apply.)
(1872) 17 Suth W R 557 (558), *Shib Ram Doss v. Sudanund Surmah*. (Do.)
(1873) 20 Suth W R 231 (231, 232), *Hossein Duksh v. Ameena Khatoon*.
(1874) 8 Mad H O R 40 (43), *The Collector of South Arcot v. Thathacharry*. (Regulation 2 of 1805)
(1866) 5 Suth W R 115 (116), *Collector of Rungpore v. Prosunno Coomar Tagore*.
(1846-51) 4 Moo Ind App 466 (496, 497) · 1 Svt 335 (P C), *Raja Mahlab Chund Bahadoor v. Government of Bengal*.
(1866) 5 Suth W R 136 (136), *Dromanund Gossain v. The Government*.
(1870) 14 Suth W R 170 (170), *Rughoonath Surmah v. Gobind Chunder Roy*.
(1872) 17 Suth W R 430 (431), *Shah Lal Mahomed v. Lalla Draj Keshore*.
(1868) 9 Suth W R 159 (160), *W. Fergusson v. The Government*.
[See also (1921) A I R 1921 Oudh 84 (90) : 61 Ind Cas 671 : 24 Oudh Cas 77, *Secretary of State v. Mohammad Qasim*.]

appeals by Government.¹ But it applies to *all* suits by the Government,² for example, to summary suits by the Government under Section 9 of the Specific Relief Act.³ The Article applies only to suits *by or on behalf of* the Government. Suits *against* the Government are not within the Article.⁴

Article 149
Notes
2—3

3. Applicability of Limitation Act to Government—General.—

The question has sometimes been raised whether, apart from the provisions which expressly or by necessary implication are declared applicable to the Government, the provisions of the Limitation Act apply to the Government. In *Appayya v Collector of Vizagapatam*,¹ where the question was whether Article 178 of the Act of 1877 (Article 181 of the Act of 1908) applied to applications by Government, the High Court of Madras observed as follows

"We are of opinion that the Government is not entitled to any exemption from the provisions of the Limitation Act relating to applications. If the maxim on which the Counsel for the Crown relies applies to this country—and the Crown is not bound by the provisions of any Act unless they are expressly declared binding on the Crown—it may be inferred from the circumstance that this Act contains provisions prescribing limitation to the Government for the institution of suits and presentation of criminal appeals, that the Legislature contemplated that the Crown should be subject to the provisions of the Act and should enjoy a privilege to the extent expressed and no further—*expressum facit cessare tacitum*."

In *Venubai v The Collector of Nasik*,² it was held that the period of limitation for an application for execution by the Government was the same as the period of limitation for a similar application by a private person. The High Court of Bombay in the above case observed as follows.

"We think that the right of Government to recover court-fees under Section 309 is subject to the same period of limitation as

Note 2

1. (1881) 4 Mad 155 (156, 157), *Appayya v Collector of Vizagapatam*
(1926) A I R 1926 Cal 1064 (1064) 53 Cal 561 . 98 Ind Cas 334, *Mahabunnessa Bibi v Secretary of State*
(1874) 22 Suth W R 512 (512) (F B), *Collector of Beerbhoom v Sreehury Chuckerbutty*
(1883) 7 Bom 552 (Note) (553), *Venubai v Collector of Nasik*
2. (1915) A I R 1915 Bom 197 (200) 40 Bom 166 . 33 Ind Cas 428, *Manilal Gangadas Desai v Secretary of State*.
3. (1925) A I R 1925 Sind 275 (279) 67 Ind Cas 1002, *Secretary of State v. Dinshaw Navroji*.
4. (1895) 19 Mad 165 (166), *Secretary of State v. Eapanamma Garu*
(1930) A I R 1930 Mad 679 (680, 682, 633) 125 Ind Cas 543, *Secretary of State v District Board of Tanjore*

Note 3

1. (1881) 4 Mad 155 (156, 157).
2. (1883) 7 Bom 552 (552) (Note)

Article 149
Note 3

the right of a subject to enforce a decree or order would be. The Legislature in passing the Limitation Act of 1871, which is applicable to this case, where it intends that the Government should have a longer period than the subject, has been careful expressly to say so: as, for instance, in Article 150 of Schedule 2, where the period assigned to suits brought by the Secretary of State is sixty years from the time of the accrual of the cause of action; but the Legislature makes no difference between Government and its subjects in the cases of appeals or applications: see *Govind Lakshman v. Narayan Moresbhar*, 11 Bom. H. C. Rep. 111."

In *The Secretary of State v. Mathurabai*,³ the High Court of Bombay held that the rule in England that the Crown is not included in an Act unless there be words to that effect is equally applicable in India and that therefore the provisions of Section 26 of the Limitation Act of 1877 did not apply to the acquisition of easements against the Government. In distinguishing the decision in *Venubai v. Collector of Nasik* (above referred to) the High Court observed as follows :

"In Special Appeal No. 7 of 1877, *Venubai v. The Collector of Nasik* (referred to in the note to I. L. R. 7 Bom. 552) the above Act came under the consideration of Westropp, C. J., and Melvill, J., who held that the period for execution in the case under Act 9 of 1871 was the same for Government as for the subject, on the ground that the express provision for a longer period of limitation in favour of Government, in case of suits, showed it was intended that Government should be bound by the ordinary period of limitation in the case of executions. But this inference cannot be extended to Section 26 of the Limitation Act which relates to an entirely different matter from the limitation of suits, viz., to a branch of substantive law and the creation of rights by the enjoyment of them, unless indeed the mere mention of the Crown in an Act be held to have the effect of making all its provisions applicable to the Crown. That this is not so, the decision of the Appeal Court in *Ex parte Postmaster-General; In re Bonham*, L. R. 10 Ch. D. 595 at page 601, where the applicability of the Bankruptcy Act to the Crown was disallowed, is an authority in point."

In the undermentioned cases⁴ it was held that the Collector can take action under Section 3 of the Bombay Bhagdari Act 5 of 1862 at any time and that his action is not subject to any rule of limitation. In one of the above cases⁵ the above view was based on the ground that the Collector acted as a representative of the Crown and the

3 (1882) 14 Born 213 (218). (Following 1 Born 7.)

maxim "*Nullum tempus aut occurrit regi*" (No time or place affects the King or the rights of the Crown) was relied on for the view that there was no limitation for the proceeding by the Collector.

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3—5

Reference may also be made to the judgment of Bhashyam Iyengar, J., in *Bell v. Municipal Commissioners of Madras*,⁶ in which he comes to the conclusion that the Government is not exempt even from taxing statutes passed by the Indian Legislatures, unless the very nature of the tax is such as to make it inapplicable to the Government

4. Suit by or on behalf of the Government — Illustrative cases.—Where a State Railway is managed by a Railway Company as managing agents under the Government, a suit by the Railway Company in respect of land belonging to such State Railway is one on behalf of the Government and as such is governed by this Article.¹

Certain land was acquired by the Government under the Land Acquisition Act for the purposes of a Railway, but before it was handed over to the Railway Company the defendant entered into possession of the land. It was held that the suit against the defendant for the recovery of the land must be by the Secretary of State and not by the Railway Company and that it would be governed by this Article.²

5. Suit by manager of religious endowment.— Before the passing of the Religious Endowments Act, 20 of 1863, religious endowments were under the management of the Government and hence, a suit by the manager of an endowment was treated as a suit by an officer of the Government brought on behalf of the Government so as to be governed by the longer period of limitation applicable to such suits.¹ But, since the passing of the Religious Endowments Act of 1863 under which the management of religious endowments has been taken away from the hands of the Government, a suit by the manager of a religious endowment cannot be treated as a suit by an officer of the Government and as brought on behalf of the Government and hence, the longer period of limitation applicable to suits by or on behalf of the Government will not apply to such suits.²

6 (1901) 25 Mad 457 (480) 12 Mad L Jour 208

Note 4

1. (1936) A I R 1936 Pat 362 (369) 163 Ind Cas 525, *Bengal North-Western Railway Co Ltd v. Janki Pershad*
- 2 (1937) A I R 1937 Pat 568 (570) 171 Ind Cas 828, *Seetharam v. Secretary of State*

Note 5

- 1 (1866) 6 Suth W R P C 3 (9) 2 Moo Ind App 800 (P C), *Jewan Dass Sahw v. Shah Kubeerooddien*
2. (1893) 20 All 482 (488, 489) 1893 All W N 123 (F B), *Behari Lal v. Md. Muttaki*
(1872) 17 Suth W R 430 (431), *Shasikh Laul v. Lalla Daj Kishore*
[See (1903) 27 Bom 500 (510) 5 Bom L R 803, *Sajun Lal v. Khan v. Raja Hussan*]

Article 149
Notes
6—7

6. Suit by Municipality. — A suit by a Municipal Committee is not a suit by or on behalf of the Government and hence is not governed by this Article.¹ Thus, this Article will not apply to a suit by a Municipal Corporation for recovery of a certain land as forming part of a highway, title to which is vested in the Corporation by statute.² But, where Government land has been entrusted to a Municipality for management and the Municipality sues in respect of such land, the suit is one on behalf of the Government and is governed by this Article.³

See also Notes under Article 146 A, *ante*.

7. Article not applicable to suit by person deriving title from Government. — This Article applies only to suits by or on behalf of the Government. It does not apply to a suit by a person deriving title from the Government.¹

Illustrations

1. A purchases from the Government certain land which, at the time of the purchase, has been in the possession of B adversely against the Government for more than twelve years. A's suit for possession against B is governed by Article 144 and not by this Article and is barred as not being within twelve years of the commencement of the adverse possession.²

Note 6

v. Sarangapani Mudaliar.
 Cas 158 (162) : 38 Mad 6,
 Council.

2. (1895) 19 Mad 154 (156), *The Municipal Commissioner v Sarangapani Mudaliar*
3. (1934) A I R 1934 Lah 960 (961) . 153 Ind Cas 964, *Labha Singh v. Municipal Committee, Amritsar*.

Note 7

- 1 (1924) A I R 1924 Cal 394 (394) : 81 Ind Cas 675, *Ananda Mohan Roy v. Kina Das*
 (1926) A I R 1926 Mad 1155 (1157, 1158) : 97 Ind Cas 253, *Yenlatusurya-narayana v. Venku Naidu*.
 (1917) A I R 1917 Lah 201 (204) : 39 Ind Cas 971, *Moolchand v. Amar Nath*.
 (1909) 2 Ind Cas 314 (314, 315) (Mad), *Madhava Gowdu v Lokanath Patro*.
 (1910) 6 Ind Cas 392 (394) (Cal), *Nawab Bahadur of Murshidabad v. Gopinath Mandol*
 (1906) 30 Mad 245 (248) . 17 Mad L Jour 174, *Kuthaperumal Rajala v. Secretary of State*
 (1904) 28 Mad 503 (506, 507) . 15 Mad L Jour 416, *Santharan Nambudri v. Veetil Thalakat Muhammad*.
 (1895) 19 Mad 154 (156), *The Municipal Commissioner v. Sarangapani Mudaliar*.
 (1875) 24 Suth W R 64 (65), *Doords Roy v. Pandit Bunsee Thakoor*.
 (1872) 17 Suth W R 377 (377), *Brindaban Chunder Sircar v. Bhoochal Chunder Biswas*
 [But see (1891) 8 Cal 230 (235, 236) : 10 Cal L R 41, *Kolashlashini Das v. Gokulmoni Das*.]
 2. (1924) A I R 1924 Cal 394 (394) : 81 Ind Cas 675, *Ananda Mohan Roy v. Kina Das*. (In such a case the purchase does not give a fresh starting point of limitation.)

2. *A* obtains a lease of certain land from the Government. He is then deprived of possession of the land by *B*. *A*'s suit for possession against *B* is not governed by this Article.³
3. *A* was in possession of certain land which belonged to the Government, adversely to the Government. The Government took steps to remove him from possession and actually removed him from possession and itself entered into possession. Thereafter it granted the land to *B*. *A* then sued *B* for possession on the ground that he had acquired a prescriptive title to the land and that he had been wrongly deprived of possession. It was held that he could not succeed unless he proved that at the time when he was deprived of possession of the land by the Government he had been in adverse possession against the Government for sixty years. The reason is that in such a case, the question is whether a suit by the Government would have been barred by limitation and not whether a suit by the transferee from the Government would have been so barred at the time when *A* was deprived of possession of the land.⁴

The mere fact that in a suit for possession of land by a transferee of such land from the Government, the latter is joined as a co-plaintiff will not make this Article applicable to the suit by the transferee.⁵ But, where the Government is entitled to sue for the restoration of possession of the land to the transferee, the suit by the Government for such restoration will be governed by this Article, although a suit by the transferee himself for possession will not be governed by this Article. Hence, in such a case, if the Government is made a co-plaintiff in the suit by the transferee, the suit, so far as the Government is concerned, will be governed by this Article, though this Article will not apply so far as the transferee is concerned.⁶

8. Resumption or assessment of lakhiraj grants — Right of Government, whether extinguished by bar of limitation. — See the undermentioned cases¹

- (1926) A I R 1926 Mad 1155 (1157) 97 Ind Cas 253, *Venkata Suryanarayana v Venku Naidu*
3. (1904) 32 Cal 129 (139) 31 Ind App 203 6 Bom L R 765 1 All L Jour 585 8 Cal W N 809 8 Sar 698 (P C), *Jagindra Nath Roy v Hemanta Kumar Das*
[See also (1915) A I R 1915 Sind 4 (5, 6), 30 Ind Cas 13 9 Sind L R 1, *Karachi Municipality v Shamoo Latha*]
- 4 (1927) A I R 1927 Mad 1082 (1084) 105 Ind Cas 202, *Manappa Udayan v. Sabapathy Asari*
- 5 (1905) 28 Mad 505 (506, 507) 15 M L J 777 116 Cal 1000 *Nanda Singh v. Vithal Thalakat Md*
[See also (1867) 11 Mo 1 Suther 676 v.
Collector of the 24 Parghanas]
6. (1872) 18 Suth W R 130 (131), *Petumber Dey v Juggannath Roy*

Note 8

1. (1903) 27 Mad 16 (20), *Jagannadham v Secretary of State* (No limitation applies to such right)

Article 149
Note 9

9. Acquisition of title by adverse possession against Government.—A title to immovable property can be acquired by adverse possession against the Government in the same way as such title can be acquired against a private person.¹ But, the person claiming such title against the Government must prove that the adverse possession has extended for a period of sixty years or more.² This is so even where the suit is not one *by* the Government but one *against* the Government. Thus, where the plaintiff sues the Government for a declaration that he has acquired a title against the Government by adverse possession for the statutory period, he must prove that his possession has extended for a period of sixty years.³

Where a person claims title by adverse possession against the Government, the burden is on him to prove such possession for the full period of sixty years. Proof of adverse possession for a shorter period will not shift the onus to the Government to show that the possession had not continued for the full period of sixty years.⁴ The contrary view taken in the undermentioned cases⁵ cannot be regarded

(1934) A I R 1934 Mad 147 (151) : 57 Mad 501 : 154 Ind Cas 990, *Thiruvankatacharyulu v. Secretary of State*. (Do.)

(1891) 8 Cal 230 (235, 236, 237) : 10 Cal L R 41, *Kailashbhashini Dossee v. Gooloomoni Dossee*. (Right barred after 60 years)

(1935) A I R 1935 Cal 363 (374) : 62 Cal 346 : 159 Ind Cas 98, *Raj Krishna v. Barabani Coal Concern Ltd.* (Do.)

Note 9

1. (1885) 9 Mad 265 (307), *Sivasubramanya v. Secretary of State*.

2. (1899) 9 Mad L Jour 141 (142), *Adavakalam Katha Nadan v. Kandasamy Pillai*.

(1892) 19 Cal 312 (321) : 19 Ind App 69 : 6 Sar 113 (P C), *Secretary of State v. Durbijoy Singh*.

(1911) 9 Ind Cas 765 (767) : 35 Bom 182, *Ranchhodlall v. Secretary of State*.

(1927) A I R 1927 Mad 456 (457) : 101 Ind Cas 96, *Secretary of State v. Muthukumara Pillai*.

(1922) 22 Cal 100 (102) : 100 Ind Cas 100, *Secretary of State v. Sree-*

Cal L Jour 460.
ia Deo v. Secre-

(1924) A I R 1924 P C 150 (154) : 51 Ind App 257 : 47 Mad 572 : 80 Ind Cas 835 (P C), *Ambu Nair v. Secretary of State*. (A person must prove continuous possession for full sixty years to acquire title against the Government.)

3. (1926) A I R 1926 Lah 437 (438) : 7 Lah 210 : 96 Ind Cas 117, *Abdul Wahab v. Secretary of State*

(1922) 22 Cal 100 (102) : 100 Ind Cas 100, *Secretary of State v. Sree-*
192 : 35 Ind Cas
of State v. Sree-

(1925) A I R 1925 Mad 780 (785, 786). 49 Mad 570 : 91 Ind Cas 130, *Krishna v. Singaravelu*

(1921) A I R 1921 Bom 177 (179) : 45 Bom 789 : 61 Ind Cas 440, *Vasta Dattant v. Secretary of State*

(1929) A I R 1929 Mad 411 (412, 413) : 119 Ind Cas 490, *Jayaram Naidu v. Secretary of State*.

5. (1892) 15 Mad 315 (318) : 2 Mad L Jour 153, *Secretary of State v. Barrett Hajj*

(1910) 5 Ind Cas 832 (833) : 33 Mad 1, *Chelilani Ramaswami v. Secretary of State*.

as good law in view of the decision of the Privy Council in *Secretary of State for India v. Chellukani Rama Rao*.⁶

As regards the essentials which will make a person's possession adverse to the Government, see Notes under Article 144. See also the undermentioned cases⁷ dealing with adverse possession of land in cantonments.

10. Special or local law. — The Article is subject to the provisions of Section 29 *ante* under which, if a different period is fixed by a special or local law, such period must apply in preference to the period laid down in the Articles in the Schedule. Thus, in the undermentioned case¹ it was held by the Judicial Commissioner's Court of Sind that a suit by the Government against the Karachi Municipality in a matter covered by Section 167 of the Bombay District Municipalities Act of 1901 was governed by the six months' period of limitation under that Section and not by this Article.

11. "Private person." — In *In the matter of the Indian Stamp Act 1899*,¹ the Bombay High Court observed as follows

"... the expression 'private person' is not a term of art it must be construed, I think, with reference to the context in which it appears 'Private person' may be used in contradistinction to an 'official person' or to a Government servant. it may have many meanings In Article 149, Limitation Act, it seems to be used in contradistinction to Government, because that Article

(1912) 16 Ind Cas 626 (629) (Mad), *Alagasanga Ayya Varalanganu v. Taluk Board, Rajahmundry*

(1866) 5 Suth W R 136 (137), *Bromanund Gossain v. The Government*

(1910) 5 Ind Cas 118 (118, 119) 33 Mad 362, *Venkatarama Aiyer v. Secretary of State*

(1912) 15 Ind Cas 257 (258) (Mad), *Narayana Pallai v. Secretary of State*

(1915) A I R 1915 Mad 720 (721) 24 Ind Cas 735, *Boyana v. Asethu*

(1885) 9 Mad 175 (181, 184), *Secretary of State v. Vira Itayan.*

(1915) A I R 1915 Mad 308 (309) 25 Ind Cas 608, *Sambasiva Mudaliar v. Secretary of State* (Though the general presumption, where a person

some one is shown to have encroached on it)

6. (1916) A I R 1916 P C 21 (27) 39 Mad 617 43 Ind App 192 35 Ind Cas 902 (P C).

7 (1922) A I R 1922 All 57 (58, 59) 66 Ind Cas 582, *Secretary of State v. Mulla*

(1910) 8 Ind Cas 1096 (1097, 1098) 33 All 229, *Bank of Upper India v. Secretary of State* (6 All 143, Followed)

(1911) 33 Ind App 201 (216) 35 Bom 1 12 Ind Cas 117 (P C), *Kaikhusrulderji v. Secretary of State*

Note 10

1. (1931) A I R 1931 Sind 55 (55) 131 Ind Cas 151, *Secretary of State v. Municipality of Karachi*

Note 11

1 (1934) A I R 1934 Bom 231 (232) 58 Bom 437 151 Ind Cas 911 (S D).

Article 149
Notes
11—12

provides that time runs against the Secretary of State from the same date as it would in a suit against a private person."²

12. Acquisition of easement against Government. — See Notes to Section 26, *ante*.

SECOND DIVISION : APPEALS

Description of appeal.	Period of limitation.	Time from which period begins to run.
Article 150 150.* Under the Code of Criminal Procedure, 1898, from a sentence of death passed by a Court of Session.	Seven days.	The date of the sentence.

Synopsis

1. Legislative changes.
2. Scope and applicability.

1. Legislative changes.

1. There was no Article corresponding to this Article in the Act of 1871. Section 271 of the Code of Criminal Procedure, 1872, however provided a period of seven days for such appeal.
2. The provision was first introduced in 1877.
3. The words "Sessions Judge" which occurred in the Act of 1877 were substituted in the present Act by the words "Court of Session."

2. Scope and applicability. — This Article applies only to appeals from a sentence of death passed by a Court of Session. As to the limitation for other appeals under the Criminal Procedure Code, see Articles 150 A, 154, 155 and 157 *infra*.

The right of appeal from a sentence of a Court of Session is given by Section 410 of the Code of Criminal Procedure.

Article 150 A

150 A. Under the Code of Criminal Procedure, 1898, from a finding rejecting a claim under section 443 of that Code.	Seven days.	The date of the finding.
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✱

Act of 1877

Substantially same as above.

Acts of 1871 and 1859

No corresponding provision.

² The expression "against a private person" in the above passage is obviously a mistake for "by a private person."

*Synopsis*Article 150 A
Notes
1—2

1. Legislative changes.

2. Scope and applicability.

1. Legislative changes.—This Article has been newly introduced into the Limitation Act by Section 42 of the Criminal Law Amendment Act 12 of 1923, which received the assent of the Governor-General on 16th March 1923.

2. Scope and applicability.—The claim under Section 443 of the Criminal Procedure Code referred to in this Article, is a claim to be tried under the special procedure of Chapter 33 of the Criminal Procedure Code relating to trial of cases outside the Presidency Towns in which European and Indian British subjects are concerned.

Where the Magistrate rejects the claim of any person to be tried under the procedure prescribed by the said Chapter, and records a finding to that effect, the person by whom such claim is made has, under the said Section 443 of the Criminal Procedure Code, a right of appeal to the Sessions Judge whose decision is final.

This Article prescribes the period of limitation for presentation of such appeals. Where the claim is rejected, the Magistrate is required to stay proceedings until the expiration of the period allowed for the presentation of the appeal under this Article, or if an appeal is presented, until it has been decided.

151.* From a decree or order of any of the High Courts of Judicature at Fort William, Madras, Bombay and Lahore in the exercise of its original jurisdiction.	Twenty days.	The date of the decree or order.	Article 151
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Synopsis

1. Legislative changes.

2. Scope of the Article.

3. Starting point.

* Act of 1877

151 — From a decree or order of any	Twenty days	The date of the decree or order.
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its original jurisdiction

Acts of 1871 and 1859
No corresponding provision.

*Synopsis*Article 150 A
Notes
1—2

1. Legislative changes.

2. Scope and applicability.

1. **Legislative changes.**—This Article has been newly introduced into the Limitation Act by Section 42 of the Criminal Law Amendment Act 12 of 1923, which received the assent of the Governor-General on 16th March 1923

2. **Scope and applicability.**—The claim under Section 443 of the Criminal Procedure Code referred to in this Article, is a claim to be tried under the special procedure of Chapter 33 of the Criminal Procedure Code relating to trial of cases outside the Presidency Towns in which European and Indian British subjects are concerned.

Where the Magistrate rejects the claim of any person to be tried under the procedure prescribed by the said Chapter, and records a finding to that effect, the person by whom such claim is made has, under the said Section 443 of the Criminal Procedure Code, a right of appeal to the Sessions Judge whose decision is final.

This Article prescribes the period of limitation for presentation of such appeals. Where the claim is rejected, the Magistrate is required to stay proceedings until the expiration of the period allowed for the presentation of the appeal under this Article, or if an appeal is presented, until it has been decided

151.* From a decree or order of any of the High Courts of Judicature at Fort William, Madras, Bombay and Lahore in the exercise of its original jurisdiction.	Twenty days.	The date of the decree or order.
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Article 151

Synopsis

1. Legislative changes.

2. Scope of the Article.

3. Starting point.

* Act of 1877

151 — From a decree or order of any Twenty days.

The date of the decree or order.

Acts of 1871 and 1859
No corresponding provision.

Article 151
Notes
1—2

Other Topics

Appeal under Indian Divorce Act ... See Note 2, Pt. 6
 "Decree or order" covers 'judgment' under Letters Patent ... See Note 3, Pt. 3
 Original jurisdiction and ordinary original civil jurisdiction: See Note 2, Pts. 4, 5
 Time for obtaining copy to be excluded, even if copy not required under rules ...
 See Note 3, Pt. 4

1. Legislative changes.

1. There was no provision corresponding to this Article in the Act of 1871 and the Act of 1859. The various High Courts framed their own rules as to the period within which the appeals referred to in this Article should be filed.¹
2. By the Amending Act 8 of 1930, the words "Lahore and Rangoon" have been substituted for the words "or the Chief Court of the Punjab or the Chief Court of Lower Burma," inasmuch as there are now High Courts in the said two provinces.
3. The word "and" was inserted before "Lahore" and the words "and Rangoon" after "Lahore" were omitted by the Government of India (Adaptation of Indian Laws) Order, 1937.

2. Scope of the Article.—This Article applies only to appeals from the decrees or orders made in the exercise of the *original* jurisdiction of the High Courts specified. It does not govern appeals from the decrees or orders made in the exercise of their *appellate* jurisdiction. The expression "*original jurisdiction*" is used in this Article as opposed to "*appellate jurisdiction*." The original jurisdiction of the High Courts includes insolvency¹ and matrimonial² jurisdictions. The power of the High Courts to issue High Prerogative Writs such as *Mandamus*, *Certiorari* and *Habeas Corpus* is part of their original jurisdiction.³ There is a distinction between the original jurisdiction of the High Court, and its *ordinary* original civil jurisdiction.⁴ The Patna and Allahabad High Courts have not

Article 151 — Note 1

1. (1893) 22 Bom 612 (616), *A v. D.*
 (1869) 12 Suth W R 459 (459) : 13 Suth W R 216 : 5 Beng L R 47, *Hurruck Singh v. Toolsee Ram Sahoy.*
 (1869) 11 Suth W R 107 (103), *In the matter of Hurruck Singh.*

Note 2

1. (1889) 13 Bom 520 (533) 16 Ind App 156 : 5 Ssr 400 : 13 Ind Jur 251 (P C), *In the matter of Candas Narrontas Navirahn.* (Case under Article 180 of the Act of 1877)
 [See however (1929) A I R 1929 Rang 229 (232) : 7 Rang 291 : 119 Ind Cas 615, *In the matter of J. W. Nasse* (Application for review of judgment passed in its insolvency jurisdiction is not within Article 162 of the Act.)]
2. (1893) 22 Bom 612 (616), *A v. D.*
3. (1930) A I R 1930 Mad 896 (902, 910) : 53 Mad 979 : 124 Ind Cas 831, *Ven. Kataratnam v. Secretary of State*
4. (1930) A I R 1930 Mad 779 (780) : 53 Mad 237 : 126 Ind Cas 481, *In the matter of Kuppusamy Nayar.*

been invested with the *ordinary* original civil jurisdiction.⁵ An appeal under the Indian Divorce Act of 1869 against a decree absolute made on the Original Side of a High Court in a suit for divorce is governed by this Article. Compare Section 29, Clause (3) of the Limitation Act, which provides that "nothing in the Limitation Act shall apply to *suits* under the Indian Divorce Act of 1869." This prohibition is restricted only to *suits* and hence does not extend to *appeals*.⁶

This Article also governs an appeal from a decree or order of the Madras City Civil Court to the High Court: vide Section 15, Clause (2) of the Madras City Civil Courts Act (7 of 1892).

3. Starting point.—Time, under this Article, commences to run from the date of the *decree* or *order* appealed from. Order 20 Rule 7 of the Civil Procedure Code provides that the decree *shall bear date the day on which the judgment was pronounced*. By virtue of O. 49 Rule 3 of the same Code, however, Order 20 Rule 7 does not apply to Chartered High Courts in the exercise of their original civil jurisdiction. But, as a matter of *practice* of the various High Courts, the decree is made to bear the date of the judgment.¹ It has accordingly been held that the starting point under the Article is the date of the *judgment* even though the decree is finally settled long after the date of the *judgment*.²

The words "*decree or order*" as used in this Article are wide enough to cover a "*judgment*" in the sense in which that word is used in the Letters Patent. Therefore, the period of limitation for an appeal under Clause 13 of the Letters Patent from a *judgment* of the Rangoon High Court on its Original Side is twenty days *from the date of the judgment*, such an appeal falling under this Article.³

In computing the period of twenty days allowed by this Article, the time taken in obtaining copies of the judgment and decree appealed from should be excluded under Section 12, sub-section 2 *ante*, even in cases where such copies are not required to be annexed to the memorandum of appeal by the rules of the High Court

5 (1930) A I R 1930 Pat 538 (544) : 10 Pat 218 : 129 Ind Cas 529 (F B), *Suraj-mol Brijlal v. Commissioner of Income-tax, Bihar and Orissa*.

6 (1898) 22 Bom 612 (616), *A v B*

Note 3

1. (1913) 21 Ind Cas 545 (545) (Mad), *Abcobuchar Rahimtulla Sait v. Official Assignee of Madras*

(1937) A I R 1937 Bom 64 (65) : I L R (1937) Bom 421 : 167 Ind Cas 664, *Nemichand Uttamchand v. Chaturbhuj Damsi*.

[See also (1884) 10 Cal 652 (659, 660, 661), *Ramey v. Broughton*. (The decision assumed that Section 205 of the old Civil Procedure Code corresponding to the present Order 20 Rule 7 applied to the decree passed on the Original Side of the High Court)]

2. See the cases cited in Foot-Note 1.

3 (1927) A I R 1927 Rang 20 (25) : 4 Rang 265 : 99 Ind Cas 417, *Jaybhoy N. Surty v. T. S. Chelliar Firm*.

(1926) A I R 1926 Rang 143 (144) : 98 Ind Cas 689, *M. H. Ariff v. Perumal*.

Article 151

concerned.⁴ Similarly, where a portion of the period allowed by this Article is occupied by the appellant in getting the order appealed from varied and settled by the Registrar, it may be excluded under sub-section 3 of Section 12.⁵ As to the question whether Section 12 can be invoked for the purposes of computing the period of limitation under this Article in cases (a) where application for copy of decree is made after the expiration of twenty days prescribed by this Article or (b) where the time limited by this Article is fully taken up in getting the *decree* prepared in accordance with the practice of the Original Side of the High Court, see the undermentioned cases.⁶

Article 152

152.* Under the Code of Civil Procedure, 1908, to the Court of a District Judge.	Thirty days.	The date of the decree or order appealed from.
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Synopsis

1. Legislative changes.
2. Scope.
- 2a. "Under the Code of Civil Procedure."
3. "Date of the decree."
4. Amendment of decree under Section 152, Civil Procedure Code—Effect of.
5. Effect of review of judgment.
6. Appeals from orders.
7. Time expiring on date on which Court is closed.
8. Extension of time.
9. Exclusion of time.

✻

Act of 1877
Same as above.

Act of 1871

Columns one and two, same as above. Column three ran :—The date of the decree appealed against.

Act of 1859

No corresponding provision.

4. (1928) A I R 1928 P C 103 (105) - 6 Rang 302 - 109 Ind Cas 1 : 55 Ind App
(Reversing on
as 852 (F B),
- Muhammad.
5. (1937) A I R 1937 P C 107 (107) - 167 Ind Cas 345 - 31 Sind L R 239, *Hubert
Rowan Hodge v Mohamed Kamgar Shah*.
6. (1937) A I R 1937 Bom 162 (163, 164) - 168 Ind Cas 77 : I L R (1937) Bom
443 (F B), *Murliidhar Shrinwas v Motilal Ramcoomar*.
(1929) A I R 1929 Cal 784 (735) - 50 Cal 709 : 121 Ind Cas 307, *Sambhu
Nath v Gopal Sastri*
11215 (F B), *Secre-
I R 1920 Cal 804*)
as 277, *Kamruddin
1999 : 63 Ind Cas
r Lee*.

1. **Legislative changes.**—This Article is the same as Article 152 of the Act of 1877 and Article 151 of the Act of 1871. In the Act of 1871, the third column contained only the words "the date of the decree appealed against." There was no reference to *orders* appealed against.

2. **Scope.**—This Article prescribes the period of limitation for an appeal under the Civil Procedure Code, to the Court of the District Judge. Article 156 *infra* prescribes the period of limitation for an appeal to the High Court except where the appeal is from a decree or order passed in the exercise of the original jurisdiction of the High Court. In the latter case, Article 151 is applicable and prescribes the period of twenty days from the date of the decree or order.

2a. **"Under the Code of Civil Procedure."**—See generally Note 3 to Article 156 *infra*. An appeal to the District Judge under the Agra Tenancy Act, 1901, against a decree of the Revenue Court is governed by the procedure prescribed by the Civil Procedure Code and the period of limitation prescribed by Article 152.¹

3. **"Date of the decree."**—See for a full discussion Note 5 to Article 156 *infra*. As will be seen from that Note, the date of the decree is the date of the judgment, no matter on what date the decree was actually signed.¹ The reason is that it is on the date of the judgment that the Court must be deemed to have expressed what the decree is, and, when a person has the judgment of the Court in his favour, it may be said that he then obtains his decree, and that decree though drawn up afterwards relates back to the date of the judgment.²

Order 20 Rule 1 of the Civil Procedure Code provides that, after the case has been heard, the Court shall pronounce judgment in open Court either at once or on some future day, of which due notice must be given to the parties or their pleaders. Where counsel of the parties have been duly given notice of the date fixed for

Article 152 — Note 2a

- 1 (1912) 17 Ind Cas 653 (653) (All), *Ram Lal v. Amar Chand*

Note 3

- 1 (1930) A I R 1930 Rang 67 (68) 126 Ind Cas 543, *U Po Thaw v. Ma Thit*.
(1899) 23 Bom 442 (445), *Famaji v. Antaji*.
(1915) A I R 1915 Mad 308 (308) 25 Ind Cas 67, *Narayanasaamy v. Krishna-swasamy*.
(1898) 25 Cal 109 (111), *Gulam Gaffar Mandal v. Goljan Bibi*.
(1936) 165 Ind Cas 53 (54) (Cal), *Kedar Nath Moyra v. Ghollam Hossein Mollah*.
(1916) A I R 1916 Cal 511 (512) 32 Ind Cas 744, *Anandram v. Nityananda Barkam*.
(1890) 12 All 461 (468) 1890 All W N 149 (T B), *Becks v. Ahsan Ullah Khan*.
(1922) A I R 1922 Nag 113 (118) 66 Ind Cas 7, *Narayan v. Ramdulars*.
(1927) A I R 1927 Rang 335 (335) 101 Ind Cas 319, *Perumal Maistry v. Paikara Komor*.
2. (1924) A I R 1924 Cal 1064 (1065) 82 Ind Cas 746, *Gurabala Das v. Biswambhar Haldar*.

Article 152
Notes
3-5

delivery of the judgment, limitation for appeal will begin to run from that date, although neither the parties nor their counsel were present.³ It is not necessary, in such cases, that the Court should communicate the result of the case to the parties.^{3a} But where a judgment is pronounced in the absence of the parties or their counsel on a date of which *no notice* had been given to them, and the Judge only sent an intimation to the plaintiff's pleader of the decision of the case against him, the judgment cannot be said to have been pronounced in accordance with law, and limitation for appeal begins to run only from the date on which intimation is received about the decision of the case and not from the date on which judgment was written and signed.⁴ But from the fact that the whole judgment has not been read out in Court, it cannot be said that judgment is not pronounced.⁵

4. Amendment of decree under Section 152, Civil Procedure Code — Effect of. — See Note 14 to Section 5 *ante*, Note 8 to Article 156 *infra* and the undermentioned cases.¹

5. Effect of review of judgment. — Where a review of judgment is granted, the result is a new decree *superseding* the original decree.¹ In this respect it differs from an *amendment of a decree* under Section 152 of the Civil Procedure Code. Where therefore a review of judgment has been granted, time for appeal from the decree passed on review runs from the date thereof.¹ And this would

3. (1927) A I R 1927 Lah 59 (59) : 98 Ind Cas 942, *B. B. & C. I. Ry. Co. v. Ramsarup Mahrumal*.

3a (1936) A I R 1936 Lah 742 (743) : 166 Ind Cas 698, *Ladha Mal-Bishen Das v. Nadar*

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5. (1926) 94 Ind Cas 121 (121) (Nag), *Kutub-ud-din v. Gulam Rabbani*.

Note 4

1. (1917) A I R 1917 Low Bur 162 (163) : 35 Ind Cas 347, *War Lone v. Rainey*.
- (1924) A I R 1924 Cal 898 (899) : 78 Ind Cas 525, *Satya Ranjan Nag v. Kshitish Chandra Pal*.
- (1925) A I R 1925 All 567 (568) : 85 Ind Cas 627, *Ishwar Prasad v. Bishunath Prasad Singh*.
- (1905) 9 Cal W N 605 (607), *Menat Ali v. Amdar Ali*.

Note 5

1. (1881) 6 Cal 22 (25) · 6 Cal L R 575 : 5 Ind Jur 522 : 3 Shome L R 197, *Joykishen Moosherjee v. Ataoor Rohoman*.
- (1906) 30 Bom 56 (60) · 7 Bom L R 664, *Vidyal v. Fulchand*.
- (1931) A I R 1931 Cal 323 (327) · 131 Ind Cas 258, *Aditya Kumar v. Abimash Chandra*.
- (1931) A I R 1931 Cal 578 (579) : 133 Ind Cas 571, *Soudamini Das v. Nabalak Mia*.
- (1924) A I R 1924 Lah 82 (82) : 4 Lah 185 · 75 Ind Cas 520, *Nawaz Ali v. Allu*.
- (1936) 165 Ind Cas 53 (54, 55) (Cal), *Kedar Nath Moyna v. Gulam Hossein McIlh*.
- (1926) A I R 1926 Oudh 55 (56) · 90 Ind Cas 119, *Ghuttur Singh v. Phulang Singh*.

be so even if the original decree is ultimately upheld on review.² See also Note 9 to Article 156 *infra*.

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6. Appeals from orders.—This Article governs also appeals under the Civil Procedure Code from orders to the District Judge. As in the case of an appeal from a decree, the memorandum of appeal in the case of orders also should be accompanied by a copy of the order appealed from as well as a copy of the judgment.¹ Where, however, a formal order has not been drawn up, it is sufficient for the appellant to attach to the memo of appeal a copy of the judgment alone and time will run from the date of the judgment.² It has also been held that where the formal order is an exact copy of the concluding portion of the judgment, failure to file a copy of such order will not invalidate the appeal.³ See also the undermentioned case.⁴

7. Time expiring on date on which Court is closed.—Where the period prescribed by this Article expires on a day on which the Court is closed, the appeal may, under Section 4 of the Act, be filed on the day on which the Court re-opens. See Notes to Section 4 *ante*.

8. Extension of time.—An appeal governed by this Article may be admitted after the expiry of the period prescribed, if sufficient cause is shown under Section 5 *ante* for not preferring it within that period. See Notes to Section 5 *ante*.

9. Exclusion of time.—As to the right of the appellant to exclude the time requisite for obtaining copies of the judgment and decree, see Notes 7 and 10 to Section 12 *ante*.

On the question as to whether and when the interval between the pronouncing of the judgment and the signing of the decree can

[See also (1923) A I R 1923 Cal 113 (114) 73 Ind Cas 34, *Gour Krishna Sarkar v Nilmadhab Saha*

(1929) A I R 1929 Bom 183 (185) 116 Ind Cas 227, *Shidramappa Belanshidappa v Gurushantappa Shankrappa*]

2 (1918) 20 Ind Cas 647 (648) (All), *Nanhe v. Mangat Rai*.

(1928) A I R 1928 Cal 418 (419) 107 Ind Cas 751, *Nisran Chandra v Abdul Hakim*

(1915) A I R 1915 Low Bur 152 (152) 27 Ind Cas 732, *Maung Kyaw v Ma Gauk*

Note 6

1 (1918) A I R 1918 All 894 (395) 42 Ind Cas 888 40 All 12, *Qasim Ali Khan v Mt Bhagwant Kuar*

(1923) A I R 1923 Bom 177 (181) 47 Bom 349 77 Ind Cas 83, *Dadabhai Framji v Cowasji Dorabji*

2 (1912) 14 Ind Cas 1006 (1006 1007) (Cal), *Kamala Das v Tarapada Mukerji* (1924) A I R 1924 All 162 (162, 163) 74 Ind Cas 486, *Kidar Nath v Nanak*

(1933) A I R 1933 All 762 (763) 147 Ind Cas 865 56 All 27, *Surendra Narain v Lal Bahadur Singh*

3. (1923) A I R 1923 All 579 (579) 74 Ind Cas 761, *Mt Kausilla Kuer v Mt Sukhdei*

4. (1902) 6 Cal W N 283 (284), *Khirode Sundari v Jnanendra Nath* (Appeal from order under Section 47, C P C.—It is sufficient to attach to the memorandum of appeal a copy of the order itself.—Copy of decree need not be attached even if such a decree may have been drawn up.)

Article 152
Note 9

be deducted in computing the period of limitation for appeal, see Note 25 to Section 12 *ante*.

Section 14 of the Limitation Act does not apply to appeals. But where through a *bona fide* mistake, time has been spent in prosecuting an appeal in a wrong Court, the delay may be excused in the exercise of the Court's discretion under Section 5.¹ But if the appellant has been guilty of carelessness, he is not entitled to extension of time on the ground of his having prosecuted his remedy in the wrong Court.²

See Note 9 to Section 5 *ante*.

Article 153

<p>153.* Under the same Code to a High Court from an order of a Subordinate Court refusing leave to appeal to His Majesty in Council.</p>	<p>Thirty days.</p>	<p>The date of the order.</p>
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1. **Scope of the Article.** — Under Section 109 of the Code of Civil Procedure an appeal lies in certain cases, direct to the Privy Council from Courts other than High Courts. Thus, the Court of First Appeal against orders under Section 101 of the Civil Procedure Code is a Court of "final appellate jurisdiction" within the meaning of Section 109 of that Code and an appeal lies direct to the Privy Council provided the other conditions necessary exist. Where in such cases leave to appeal is refused under Order 45 Rule 6 of the Code, an appeal from such order of refusal will lie under Order 43 Rule 1, Clause (v). This Article provides the limitation for such appeals.

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Act of 1877

<p>153 — Under the same Code, Section 601, to a High Court.</p>	<p>Thirty days.</p>	<p>The date of the order refusing the certificate.</p>
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Acts of 1871 and 1859

No corresponding provision.

Note 9

1

2. (1904) 23 Bom 235 (237) : 5 Bom L R 947, *Daudbhai Musabhai v. Emnabai*.
 (1907) 34 Cal 216 (219) : 5 Cal L Jour 380, *Sarat Chandra Bose v. Saraswati Debi*.
 (1922) A I R 1922 Lah 233 (234) : 2 Lah 1, *United Ali v. Jhangmaghiana Municipality*. (Revision filed though appellant knew appeal lay—Delay not excused.)

154.* Under the Code of Criminal Procedure, 1898, to any Court other than a High Court.	Thirty days.	The date of the sentence or order appealed from.
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Article 154

Synopsis

1. Scope and applicability.
2. Appeals from orders under Sections 476 and 476 A of the Criminal Procedure Code — Starting point.
3. Appeals from jail.

1. Scope and applicability. — This Article applies to appeals under the Code of Criminal Procedure to any Court *other than the High Court*. The next Article and Article 157 apply to appeals to the *High Court*, excepting appeals covered by Article 150 Chapter 31 of the Code of Criminal Procedure specifies the various cases in which appeals will lie to Courts other than the High Court, and Section 476 B provides that an appeal shall lie from an order making or refusing to make a complaint under Sections 476 and 476 A of the Code.

An *application* under sub-section 6 of Section 195 of the Code of Criminal Procedure before its amendment in 1923, was held not to be an appeal and not governed by this Article¹ That sub-section has now been abolished, and the said cases are no longer of any importance

An application made under Section 520 of the Code of Criminal Procedure to a Court of appeal, confirmation, reference or revision is not in the nature of an appeal, so as to attract the provisions of the Limitation Act²

2. Appeals from orders under Sections 476 and 476 A of the Criminal Procedure Code—Starting point.—Where an application under Section 476 of the Code of Criminal Procedure asking the Court to make a complaint is *refused*, time runs from the date of the

* Act of 1877, Article 154 and Act of 1871, Article 152

Substantially same as above

Act of 1859

No corresponding provision.

Article 154 — Note 1

- 1 (1916) A I R 1916 Mad 1110 (1111) 14 Ind Cas 305 13 Cri L Jour 209 29 Mad 750 (F B), *Bapu v Bapu*
 (1912) 16 Ind Cas 167 (169) 13 Cri L Jour 599 40 Cal 239, *Pochy Mistay v Emperor*
 (1920) A I R 1920 Lah 305 (305) 1 Lah 602 60 Ind Cas 33 22 Cri L Jour 177, *Punna Lal v Jamita Mal*
 2 (1927) A I R 1927 Mad 797 (798) 50 Mad 916 104 Ind Cas 719 28 Cri L Jour 879, *Srinivasa Moorthi v. Narasimhalu Naidu*

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*order of refusal.*¹ Where, however, an order is made *directing* a complaint to be filed, time is to be calculated not from the date of such order but from the date when the complaint *has been actually made*. The reason is that Section 476B of the Code of Criminal Procedure gives a right of appeal to a person against whom a complaint "*has been made*."²

3. Appeals from jail.—For the purposes of computing the period of limitation in the case of appeals preferred by appellants in jail, time is to be calculated up to the date of presentation of the appeal to the officer in charge of the jail. The reason is that under the provisions of Section 420 of the Criminal Procedure Code, presentation of the petition of the appeal to the officer in charge of the jail is equivalent to the presentation to the Court so far as the requirements of the Limitation Act are concerned.¹

Article 155

<p>155.* Under the same Code to a High Court, except in the cases provided for by article 150 and article 157.</p>	<p>Sixty days.</p>	<p>The date of the sentence or order appealed from.</p>
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Synopsis

1. Scope.
2. Appeal from order of Civil Court under Section 476 of the Criminal Procedure Code.
3. Appeal from order of Single Judge of High Court.
4. Application for leave to appeal under Section 449 of the Criminal Procedure Code.
5. Starting point.

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Act of 1877

Substantially same as above.

Act of 1871, Article 153

Column one—Under the same Code to the High Court
 and three substantially same as above

Act of 1859

No corresponding provision

Note 2

1. (1925) A I R 1925 Cal 1228 (1230) : 52 Cal 1009 . 90 Ind Cas 529 : 26 Cri L Jour 1569, *Chunder Kumar Sen v. Mathuriya Debva*.
 (1931) 1931 Mad W N 1064 (1067), *Kandasamy Pillai v. Thirunavikarasu Pillai* (A I R 1928 Bom 64 and A I R 1925 Cal 1228, Referred to.)
2. (1928) A I R 1928 Bom 64 (64) . 108 Ind Cas 26 : 52 Bom 164 : 29 Cri L Jour 315, *Daga Devji Patil v. Emperor*.
 (1927) 106 Ind Cas 584 (584) (Lah), *Labha Mal v. Wasaun Mal*.
 (1927) A I R 1927 Lah 54 (54, 55) : 7 Lah 77 . 98 Ind Cas 893 : 27 Cri L Jour 1921, *Fitzholmes v. Emperor*.
 (1935) A I R 1935 Nag 199 (200) . 1935 Cri Cas 1096 : 31 Nag L R 370 : 158 Ind Cas 496 : 36 Cri L Jour 1371, *Bal Gound v. Jannabai*.

Note 3

1. (1886) 9 Mad 258 (259) . 1 Weir 789, *Quegn-Empress v. Lingayya*.

1. Scope. — This Article applies to appeals, under the Criminal Procedure Code, to the High Court except in the cases provided for by Articles 150 and 157. In other words, it applies to all appeals to the High Court under the Code of Criminal Procedure, excepting appeals from sentences of death, and appeals from acquittals¹

An appeal preferred to the High Court under the Extradition Act is not one under the Criminal Procedure Code and is not governed by this Article²

2. Appeal from order of Civil Court under Section 476 of the Criminal Procedure Code. — An appeal against the order of a Civil Court (e. g. the District Judge), making or refusing to make a complaint under Section 476 of the Criminal Procedure Code is *not* a *civil appeal* governed by the Civil Procedure Code, but an appeal under the Criminal Procedure Code and is governed by this Article and not by Article 156.¹

3. Appeal from order of Single Judge of High Court. — The Article is not limited to appeals to the High Court from Courts in the mofussil, but extends also to appeals from orders of a Single Judge of the High Court to a Division Bench of the High Court. Thus an appeal from an order of a Single Judge of a High Court under Section 449, sub-section 1, clause (c) of the Criminal Procedure Code is an appeal under the Criminal Procedure Code, and consequently this Article will apply.¹

Suppose an order is passed under Section 476 of the Criminal Procedure Code by a Single Judge of the High Court. The question whether an appeal will lie to a Bench of the same High Court under Section 476 B of the said Code depends upon the question whether such Single Judge can be considered as the *subordinate* of the Division Bench. The reason is that an appeal lies under that Section only to the Court to which the Court passing the order sought to be appealed from is *subordinate*. It has been held by the High Court of Allahabad² and the Chief Court of Lower Burma³ that

Article 155 — Note 1

1. (1925) A I R 1925 Rang 89 (39) 2 Rang 886 26 Cri L Jour 293 84 Ind Cas 437, *In re Abdulla* (Appeal under S 408 (b), Criminal P C, from a sentence exceeding 4 years by a specially empowered Magistrate)
2. (1892) 15 Mad 414 (415) 2 Mad L Jour 142 1 Weir 588, *Hayes v. Christian*.

Note 2

1. (1927) A I R 1927 Cal 718 (719) 104 Ind Cas 456 28 Cri L Jour 640, *Rajani Kanta Kayal v. Bisoomoni Das*
- (1926) A I R 1926 All 211 (212) 93 Ind Cas 851, *Sheo Prasad v. Sheo Das Rai*
- (1926) A I R 1926 Sind 215 (216) 20 Sind L R 90 27 Cri L Jour 780 95 Ind Cas 316, *Gerimal v. Sheuaram*.

Note 3

1. (1926) A I R 1926 Cal 1203 (1204) 53 Cal 746 98 Ind Cas 248 27 Cri L Jour 1804, *Thomas v. Emperor*
2. (1917) A I R 1917 All 474 (475) 36 Ind Cas 585 39 All 147 17 Cri L Jour 537, *Ramjas v. Mahadeo Pershad*
3. (1911) 12 Cri L Jour 469 (470) 11 Ind Cas 1005 6 Low Fur Rul 25, *Tlan Pe v. Ba Than*

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a Single Judge of the High Court is not subordinate to the High Court, and therefore an order by such Single Judge under Section 476 is not appealable at all under Section 476 B to the High Court. The High Courts of Bombay,⁴ Calcutta⁵ and Madras⁶ have, on the other hand, held that he is so subordinate and that an appeal will lie to the High Court under Section 476 B. In the latter view, the appeal so preferred will be one under the Criminal Procedure Code⁷ and will be governed by this Article. In the undermentioned case⁸ the question was raised whether Article 151 or this Article will apply to such cases, but it was not decided. It is submitted that Article 151 which is a general provision will not prevail against this Article which is a specific provision.

4. Application for leave to appeal under Section 449 of the Criminal Procedure Code.—An application for leave to appeal under Section 449 of the Criminal Procedure Code has been held to be governed by the sixty days' rule under this Article. The reason is that such application must necessarily precede the admission of the appeal itself. In other words, where the appeal is barred under this Article, the application must also necessarily be barred.¹ Similarly an application under Section 449 for determination of the status of the accused as an European British subject presented after sixty days from the date of the conviction would be barred by limitation, as the appeal itself would be barred.²

5. Starting point.—Where a complaint is directed to be made under Section 476 of the Criminal Procedure Code, time runs from the date of *making the complaint* and not from the order directing the complaint to be made.¹ (See also Notes to Article 154.)

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Note 4

- (1926) A I R 1926 Cal 1203 (1204) : 53 Cal 746 : 98 Ind Cas 248 : 27 Cri L Jour 1804, *Thomas v. Emperor*
- (1927) A I R 1927 Cal 307 (308) : 54 Cal 52 : 101 Ind Cas 657 : 28 Cri L Jour 481, *Gallagher v. Emperor*
- (1926) A I R 1926 Cal 1203 (1204) : 53 Cal 746 : 98 Ind Cas 248 : 27 Cri L Jour 1804, *Thomas v. Emperor*.

Note 5

- (1927) A I R 1927 Lah 54 (54) : 98 Ind Cas 393 : 7 Lah 77 : 27 Cri L Jour 1821, *Fitzhalmes v Emperor*

156.* Under the Code of Civil Procedure, 1908, to a High Court, except in the cases provided for by article 151 and article 153. | Ninety days. | The date of the decree or order appealed from.

Article 156

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Under the Code of Civil Procedure."
4. "High Court."
5. "Date of the decree."
6. Decree or order.
7. Several decrees in same suit.
8. Amendment of decree — Effect of.
9. Review of judgment — Effect of.
10. Death of party after decree.
11. Ex parte decree set aside by trial Court but restored by High Court.
12. Section 4 and this Article.

Other Topics

'Appeal' means appeal preferred as of right ... See Note 2
 Letters Patent Appeal—Article not applicable ... See Note 2, Pt 2
 Right of appeal conferred by other Acts but procedure governed by Civil Procedure Code—Article applies .. See Note 3, Pts 1 to 3
 Section 5 and this Article See Note 8

1. Legislative changes.

1. Article 154 of the Act of 1871, corresponding to this Article, did not contain in the first column the words "except in the cases provided by Article 151 or Article 153" as there were no such Articles in that Act. Nor did it contain in the third column, the words "or order."
2. Article 156 of the Act of 1877 was worded in terms similar to this Article

2. Scope of the Article.—Article 151 *ante* provides for appeals from decrees or orders of certain High Courts in the exercise of their

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Act of 1877

Same as above

Act of 1871

163 To a High Court for the admission of a special appeal | Ninety days | The date of the decree appealed against

Act of 1859

No corresponding provision

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2—3

original jurisdiction. Article 153 provides for an appeal to a High Court from an order of a subordinate Court refusing leave to appeal to His Majesty in Council. This Article applies to all appeals under the Code of Civil Procedure to a High Court other than those provided by Articles 151 and 153.

An "appeal" means an appeal which is preferred *as a matter of right* and not an appeal which is entertainable or not at the discretion of the Appellate Court. Thus, where it was provided by Section 27 of the Burma Courts Act (17 of 1875) that the Judicial Commissioner *may* receive an appeal under certain circumstances, it was held by the High Court of Calcutta that such an appeal was not governed by the period of limitation prescribed by this Act for appeals to the High Court.¹ It has been held by the Chief Court of Oudh that an appeal from the judgment of a Single Judge of the High Court made in the exercise of its appellate jurisdiction under the Letters Patent (which provides that no such appeal will lie *unless the Judge declares that the case is a fit one for appeal*) is not governed by this Article.²

3. "Under the Code of Civil Procedure." — The expression "appeal under the Code of Civil Procedure" means an appeal governed by the Code of Civil Procedure *so far as procedure is concerned*. It is not restricted to appeals the *right to prefer* which is conferred by the Civil Procedure Code. Where, under Section 49 of the Burma Courts Act (17 of 1875) there was a right of appeal from the Court of the Recorder of Rangoon to the High Court, and, under Section 97 of that Act the procedure to be followed was that of the Code of Civil Procedure, it was held by the High Court of Calcutta in *Aga Mahomed v. Cohen*¹ that the appeal was one "under the Code of Civil Procedure" within the meaning of this Article. Their Lordships observed:

"The Limitation Act, Schedule 2, Article 156, when it speaks of the Civil Procedure Code, is, on the face of it, speaking of a Code which relates to procedure, and does not ordinarily deal with substantive rights; and the natural meaning of an appeal under the Civil Procedure Code appears to us to be an appeal governed by the Code of Civil Procedure so far as procedure is concerned."

The case was followed by the High Court of Madras in *Ramaswamy Pillai v. Tahsildar of Madura*,² where the question was in respect of the period of limitation applicable to an appeal to the

Article 156 — Note 2

- 1 (1884) 10 Cal 946 (948, 949, 950), *Mahomed Hossain v. Inodeen*. (On a reference from (1872-1892) Low Bur Rul 275 (277))
2. (1928) A I R 1928 Oudh 108 (109). 3 Luck 145. 106 Ind Cas 496, *Mt Braj Rani v. Sibta Din*

Note 3

- 1 (1886) 13 Cal 221 (224)
- 2 (1920) A I R 1920 Mad 407 (408). 43 Mad 51 : 53 Ind Cas 405. (13 Cal 221, Followed)

High Court under Section 54 of the Land Acquisition Act (1 of 1894). After referring to *Aga Muhammad's Case*,¹ and the passage quoted above, their Lordships observed as follows :

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3—4'

"There seems to be no good reason for saying that an appeal under the Civil Procedure Code means only an appeal, the right to prefer which is conferred by the Code itself. On the other hand, it would not be straining the language of the Article too much to hold that an appeal, the procedure with respect to which from its inception to its disposal is governed by the Civil Procedure Code, may rightly be spoken of as an appeal under the Code. This interpretation seems to us to be strengthened by the reference in Article 156 itself to Article 151 of the same Schedule. Article 151 provides for appeals from a decree or order of the High Court in the exercise of its original jurisdiction. Now, though the right to appeal from such decrees or orders is not given by the Code of Civil Procedure, but by the Letters Patent, yet Article 156 speaks of such appeals as appeals under the Civil Procedure Code. That also tends to show that what is meant by the Legislature is appeals, the hearing and disposal of which is governed by the rules of procedure laid down in the Civil Procedure Code."

In *Dropadi v. Hira Lal*,² Sir Henry Richards, C. J., observed as follows :

"There are several Acts, for example, the Succession Act, the Probate and Administration Act, and the Land Acquisition Act, which make the Code of Civil Procedure applicable to proceedings under the Act and give a right of appeal to the High Court, but do not prescribe any period of limitation for the appeal. It has always been assumed, probably rightly, that such appeals are appeals under the Code of Civil Procedure, governed by what is now Article 156 of Schedule 1 to the Limitation Act and by the general provisions of the Act also."

See also the undermentioned case ³

4. "High Court." — There is no definition of the expression "High Court" in this Act, and, consequently, the definition thereof given in the General Clauses Act (10 of 1897) will apply. Section 3, sub-section 24 of that Act defines "High Court" as follows

"'High Court', used with reference to civil proceedings, shall mean the highest Civil Court of Appeal, (not including the Federal Court) in the part of British India in which the Act or Regulation containing the expression operates "

³ (1912) 16 Ind Cas 149 (153) 34 All 496 (F B)

⁴ (1928) A I R 1928 Lah 488 (489) 110 Ind Cas 374, *Pana Eibi v. Mahla* (Article 156 of Schedule 1 of the Limitation Act applies to appeals under special Acts, the procedure in respect of which is governed by the Code of Civil Procedure. Therefore limitation for an appeal under Section 47, Guardians and Wards Act, is 90 days from the date of the order under appeal.)

Article 156
Note 5

5. "Date of the decree."—Order 20 Rule 7 of the Code of Civil Procedure provides that "the decree shall bear date the day on which the judgment was pronounced" and that "when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree." The date of the decree is, therefore, the *date of the judgment* even though the decree was actually signed later. This view has been generally accepted as applying to the interpretation of the words "date of the decree" in this Article also.¹ A contrary view, namely, that time runs from the date on which the decree is *signed*, has been taken in some cases. In *Ram Asray Singh v. Sheonandan Singh*,² Champier, C. J., held that time ran under this Article from the date on which the decree was *signed* and not from the date on which the judgment was delivered. He relied for this view on the decision of the Calcutta High Court in *Beni Madhub Mitter v. Matungini Dasi*.³ That decision, however, did not decide that time ran from the date on which the decree was signed. On the contrary, it decided that time did run from the date of the judgment, but that in computing the period of limitation the period between the date of the judgment and the date of signing the decree should be *excluded* under Section 12 of the Limitation Act as being time requisite for obtaining copies. In two cases decided by him, Kinkhede, A. J. C., also took the view that the starting point under this Article was the date on which the decree was *signed*.⁴ His view has not, however, been accepted in later decisions of the Nagpur Court.⁵ A Single Judge of the Lahore High Court⁶ has purported to follow the view expressed in *Beni Madhab's case*⁷ as well as those expressed by the Patna High Court in *Ram Asray's case*⁸

Note 5

1. (1923) A I R 1923 Pat 129 (130) : 75 Ind Cas 879. 1 Pat 771, *Sagarmal Marwari v. Lachmisanan Misir*.
- (1927) A I R 1927 Nag 1 (2) : 98 Ind Cas 1057 (F B), *Umda v. Rupchand*
- (1926) A I R 1926 Nag 349 (349) : 22 Nag L R 60 : 97 Ind Cas 807, *Dindayal v. Anop*.
- (1928) 112 Ind Cas 715 (716) (All), *Firm Baldeo Prasad Babu Ram v. Firm Haji Ali Mohammad Usman*.
- (1926) 94 Ind Cas 121 (121) (Nag), *Kutub-ud-din v. Gulam Rabbani*
- (1929) A I R 1929 Rang 116 (116) : 7 Rang 18 : 117 Ind Cas 251, *Maung Po Kyaw v. Ma Lay*
- (1886) 13 Cal 104 (106) (F B), *Beni Madhub Mitter v. Matungini Dasi*
2. (1916) A I R 1916 Pat 267 (267) : 35 Ind Cas 868 (F B).
3. (1886) 13 Cal 104 (106) (F B).
4. (1926) A I R 1926 Nag 207 (207) : 89 Ind Cas 938, *Tukaram v. Luzim-narayan*
- (1924) A I R 1924 Nag 271 (278) : 20 Nag L R 131. 78 Ind Cas 996, *Pandu v. Rajeshwar*.
5. (1927) A I R 1927 Nag 1 (2) : 98 Ind Cas 1057 (F B), *Umda v. Rupchand*
- (1926) A I R 1926 Nag 349 (349) : 22 Nag L R 60 : 97 Ind Cas 807, *Dindayal v. Anop*.
- (1926) 94 Ind Cas 121 (121) (Nag), *Kutub-ud-din v. Gulam Rabbani*.
6. (1936) AIR 1936 Lah 976 (978) : 16S I C. 697, *Khan Chand v. Gurdit Singh*.
7. (1886) 13 Cal 104 (106) (F B).
8. (1916) A I R 1916 Pat 267 (267) : 35 Ind Cas 868 (F B).

and by Kinkhede, A. J. C., in the two Nagpur cases referred to above. It is submitted that the view that time runs from the date the decree is signed is not correct. The Article clearly specifies the starting point as the date of the decree, and the date of the decree is under Order 20 Rule 7 clearly the date of the judgment. The Legislature must be presumed to have known of this interpretation when it repeated the Article in the present Act. It does not seem permissible to make time run from a date other than that specified in the Article on any ground of supposed hardship. It is also submitted that there does not really seem to be any hardship in accepting the view that the date of the decree is the date of the judgment. A party must know on the date of the judgment itself whether he is going to appeal or not against it. And if he intends to do so he can immediately apply for copies of judgment and the decree and, automatically the time taken by the Court in preparing the decree would be excluded under Section 12 of the Act. There is no reason why he should be allowed to wait until the decree is prepared before applying for copies.

Order 20 Rule 1 of the Civil Procedure Code provides that when the judgment is not pronounced immediately after the case is heard, notice must be given to the parties or their pleaders of the day on which the judgment is to be pronounced. Where a judgment is delivered without such notice, it must be taken that the judgment was never pronounced according to law, and time for an appeal will run from the date on which the party or his pleader receives intimation of the decision of the case against him.⁹

Where the Judge gave a judgment but considering that the plaintiff was liable under the Stamp Act to pay a penalty on the sale deed in suit, he ordered that the decree should not be drawn up until that penalty had been paid, and the decree was prepared and signed on the date on which the penalty was eventually paid, it was held in the undermentioned case¹⁰ that the judgment did not become an operative judgment until the date when the preparation of the decree was ordered and that this was the date of the judgment as well as of the decree from which limitation would run.

6. "Decree or order."—It has been held in the undermentioned case¹ of the Patna High Court that the word "decree" in this Article is not confined to a decree as defined under Section 2 of the Civil Procedure Code, and that an order having the force of a decree under special or local Acts, such as an order under Section 105 of the Bengal Tenancy Act, is a decree for the purposes of this Article also.

- 9 (1927) A I R 1927 Lah 839 (539) 100 Ind Cas 909, *Sera Ram v. Massu*
 (1919) A I R 1919 Lah 102 (103) 1919 Pun Re No 27 51 Ind Cas 239,
Lalli v. Sain Ditta
 10 (1916) A I R 1916 Sind 2 (8) 9 Sind L R 193 31 Ind Cas 867, *Khudadad v. Moriohkan*

Note 6

- 1 (1920) A I R 1920 Pat 622 (623, 624) 57 Ind Cas 236 (F L), *Gela v. Janaki Kuer*

Article 156
Notes
6—8

It is submitted that this view does not seem to be correct. The Civil Procedure Code is an enactment in *pari materia* with the Limitation Act, and contains a definition of "decree" as well as of "order". There is no reason why the words should be considered to have a different meaning here. No difficulty is created by limiting the word "decree" to the definition given to it by the Civil Procedure Code, inasmuch as if there is a right of appeal from an order to the High Court, the period of limitation is that prescribed by this Article, whether or not the order amounts to a "decree" as defined in the Civil Procedure Code.²

In certain proceedings it often happens that although there is a judgment, an order, i.e., the formal expression of the decision, is not drawn up. In such cases the concluding portion of the judgment which embodies the order is to be treated as the order against which the appeal is to be preferred, and time will run from the date of the judgment.³

7. Several decrees in same suit. — Where there are *several* judgments and *several* decrees in the same suit, time for appeal against a particular decree will run from the date of *that* decree. Thus, time for an appeal against a preliminary decree will run from the date of that decree and not from the date of the final decree.¹ Where there are several decrees against different defendants on different dates, the starting point for appeal for any particular defendant will be the date of the particular decree against him.² Similarly, where an interlocutory judgment was passed against one of two defendants and thereafter a final judgment and decree was passed against both the defendants, it was held by the High Court of Rangoon that the decree must be read as if there were two decrees, one relating to the interlocutory judgment and one relating to the final judgment, and that time for an appeal against the interlocutory judgment ran from the date thereof, even though the decree was signed only on the date of the final judgment.³

8. Amendment of decree — Effect of. — See also Note 14 to Section 5 *ante*.

An amended decree must be taken as in force from the date of the original decree. There is a distinction between a case of amendment and one of novation or substitution. Where an instrument is amended so as to express the real intention which, it was

² See also (1920) A I R 1920 Mad 407 (408) : 43 Mad 51 : 53 Ind Cas 405, *Ramaswamy Pillai v Tahsildar of Madura*.

³ (1912) 14 Ind Cas 1006 (1007) (Cal), *Kamala Das v. Tarapada Mukerji*.

Note 7

¹ (1933) A I R 1933 Cal 796 (796) : 146 Ind Cas 359, *Benodini Choudhuran v. Jagabandhu Roy*

² (1916) A I R 1916 Mad 1010 (1010) : 31 Ind Cas 917, *Sambasiva Iyer v. Muhammad Hussain Rowther*

³ (1936) A I R 1936 Rang 313 (314) : 164 Ind Cas 718, *Hock Sein v. Kyaukse Municipality*

intended to express, but which it did not completely express, the transaction is not, in substance, varied, but only its inaccurate description rectified.¹ On this principle it has been held that an amendment of a decree under Sections 151 or 152 of the Civil Procedure Code does not give a fresh starting point of limitation for an appeal² or application, except an application for execution of a decree in respect of which it is specifically provided by Article 182 *infra* that time shall run from the date of amendment. Where, however, a party is prejudiced by an amendment but finds that, at the date of the amendment, an appeal from the decree is barred if the period is calculated from the original decree, the Court will excuse the delay under Section 5 of the Act.³

There are however some decisions which have taken a somewhat different view. In *Mt. Gopi Bibi v. Chanu Prasad*,⁴ it was observed by the Patna High Court, purporting to follow the decision of the Calcutta High Court in *Amar Chandra v. Asad Ali*,⁵ that where a decree is amended in *material particulars*, time would run from the date of the amendment. It was also observed that, in any case, the delay caused by the amendment would be excused under Section 5 of the Act. In *Soudamini Das v. Nablak Mia*,⁶ it was held that where a decree is amended, whether by way of review or under Section 152 of the Civil Procedure Code, time for appeal therefrom would run from the date of the amendment. It is submitted that this contrary view cannot be accepted as correct on principle.

9. Review of judgment — Effect of. — If a decree is modified on review or even if the same decree is passed after review is granted, the old decree is superseded and the decree for the purposes of appeal is the decree passed on review. The "date of the decree" in such cases will be the date of the review decree.¹ But where an application for

Note 8

- 1 (1891) 14 Mad 150 (152), *Pydel v. Chathappan*
(1892) 15 Mad 403 (401) . 1 Mad L Jour 535, *Chathappan v. Pydel*
- 2 (1906) 3 Cal L Jour 188 (191, 192), *Brojolal Roy v. Tara Prasanna Bhatta-charya*
(1917) A I R 1917 Low Bur 162 (163) 85 Ind Cas 347, *Wor Lone v. G. Rainey*.
(1920) A I R 1920 Pat 622 (625) 57 Ind Cas 236 (FB), *Golab v. Janki Kuer*
- 3 (1906) 3 Cal L Jour 188 (191, 192), *Brojolal Roy v. Tara Prasanna Bhatta-charya*
(1930) A I R 1930 Pat 142 (143) 117 Ind Cas 187, *Mt. Gopi Bibi v. Chanu Prasad*
- 4 (1930) A I R 1930 Pat 142 (143) 117 Ind Cas 187
- 5 (1905) 32 Cal 908 (909), *Amar Chandra Kundu v. Asad Ali Khan*
6. (1931) A I R 1931 Cal 578 (579) 133 Ind Cas 571 (A I R 1931 Cal 323, Followed)

Note 9

1. (1928) A I R 1928 Cal 418 (419) 107 Ind Cas 751, *Nibaran Chandra Sakdar v. Abdul Halim*
(1926) A I R 1926 Oudh 55 (56) 90 Ind Cas 119, *Ghuttur Singh v. Phulang Singh*.
(1931) A I R 1931 Cal 323 (325, 326) . 131 Ind Cas 258, *Aditya Kumar v. Abinash Chandra*

place of the old and that therefore time would run from that date. It does not seem correct that the third column must be read differently from what it plainly purports to say.

12. Section 4 and this Article. — This Article should be read with Section 4 *ante*, and the period allowed for filing an appeal is the time allowed by Article 156 *plus* the time during which the Court was closed.¹

Article 156
Notes
11—12

157.* Under the Code of Criminal Procedure, 1898, from an order of acquittal.	Six months.	The date of the order appealed from.
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Article 157

Synopsis

1. Legislative changes.
2. Scope and applicability.

1. Legislative changes.

- 1 There was no Article corresponding to this in the Act of 1871. Under Section 272 of the Code of Criminal Procedure (Act 10 of 1872), it was provided that the rules of limitation were not applicable to appeals against acquittal. By the Amending Act 11 of 1874, a period of six months was provided for such appeals.¹ This provision was transferred to the Limitation Act in 1877, and inserted as Article 157 of that Act.
- 2 The word "judgment" which occurred in Article 157 of the Act of 1877 has in the present Act been substituted by the word "order"

2. Scope and applicability. — This Article refers to appeals under the Criminal Procedure Code from an *order of acquittal*. The only Sections of that Code that provide for appeals from orders of *acquittal* are Sections 417 and 449 sub-section 2, and under these two Sections it is only the *Government* that can appeal and not any private person.

Although an appeal under Section 417 would be in time if brought within six months of the date of the order of acquittal, still, justice,

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Act of 1877

Substantially same as above.

Acts of 1871 and 1859

No corresponding provision

Note 12

1. (1931) A I R 1931 Pat GO (GO) 130 Ind Cas 265, *Ram Chandra Shukla v. Sri Thakurji Mandi Darhadhis*

Article 157 — Note 1

1. (1877) 2 Cal 436 (438) (F B), *The Empress v. Jayadulla*
(1874) 11 Bom H C R 117 (118, 119), *Regina v. Dorabji Balabhai*.

Article 157
Note 2

public interest, necessity and policy, all require that such appeals should be preferred with all reasonable expedition possible, for there may be cases where a new trial may have to be ordered or further evidence to be taken and the larger the interval that has elapsed since the investigation and trial, the greater is the inconvenience and difficulty, not only to get witnesses together but to obtain from them accurate or reliable testimony.¹ The effect of this Article is to fix the period of limitation in respect of all classes of cases of acquittal, whatever may have been the *form* of trial and whatever may be the scope of the appeal, i. e., whether the trial was or was not one by a jury and whether the scope of the appeal extends to questions of fact as well as to questions of law.²

THIRD DIVISION : APPLICATIONS

Description of Application	Period of limitation.	Time from which period begins to run.
Article 158 158.* Under the Code of Civil Procedure, 1908, to set aside an award.	Ten days.	When the award is filed in Court and notice of the filing has been given to the parties.

Synopsis

1. Legislative changes.
2. Scope and applicability.
3. Period of limitation.
4. Starting point.
5. Extension of time.
6. Exclusion of time.
7. Effect of bar.

* Act of 1877		
158.—Under the Code of Civil Procedure, to set aside an award.	Ten days.	When the award is submitted to the Court.
Act of 1871		
155.—Under the Code of Civil Procedure to set aside an award	Ten days	When the award is submitted to the Court, and notice of the submission has been given to the persons and in manner prescribed by the High Court.
Act of 1859		
No corresponding provision.		

Note 2

1. (1883) 5 All 253 (255) . 1883 All W N 25, *Empress of India v. Yakub Khan*. (1932) A I R 1932 Rang 146 (147) . 10 Rang 312 : 138 Ind Cas 523 : 33 Cri L Jour 701 : 1932 Cri Cas 709, *Emperor v. U San Win*.
2. (1934) A I R 1934 Cal 610 (611) . 61 Cal 991 : 151 Ind Cas 662 : 35 Cri L Jour 1367 : 1934 Cri Cas 903, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Bagirath Mahto*.

1. Legislative changes. — Article 155 of Act 9 of 1871 corresponding to this Article provided that time ran from the date "when the award is submitted to the Court, and notice of the submission has been given to the persons and in manner prescribed by the High Court." Under Article 158 of Act 15 of 1877 the starting point was the date "when the award is submitted to the Court." These words were altered to their present form by Section 2 and Schedule 1 of the Repealing and Amending Act 18 of 1919.

2. Scope and applicability. — An award made on a *reference through Court* can be set aside on an application made for the purpose, on any of the grounds specified in Paragraph 15, Schedule 2 of the Code of Civil Procedure. An award made on a *reference without the intervention of the Court* cannot be set aside on any application, though it may be filed on an application under Paragraph 20 of that Schedule.

This Article applies only to an *application to set aside* an award, that is, to an application under Paragraph 15 aforesaid.¹ Thus, it will not apply to the following cases —

1. An application to *modify or correct* an award under Paragraph 12 of that Schedule.²
2. An application for *remission* of an award under Paragraph 14 of that Schedule.³
3. An application to *file* an award under Paragraph 20 of that Schedule.⁴
4. A *written statement* filed by defendant in answer to an application for filing an award under Paragraph 20 aforesaid.⁵

In the first three cases the application is not to *set aside* the award, and in the last case there is no *application* but only a *defence* to which the Limitation Act itself does not apply.

As to whether a party is bound to apply to set aside an award which is *null and void* and whether the Court can take notice of such invalidity, see the Authors' Commentaries on the Civil Procedure Code, Schedule 2, Paragraphs 15 and 16 and the Notes thereto.

An application to revise a decree passed on the basis of an award is virtually an application to set aside the award, and is therefore

Article 158 — Note 2

1. (1886) 8 All 64 (67) 1886 All W N 2, *Muhammad Abid v. Muhammad Ashgar*
2. (1919) A I R 1919 Mad 877 (877) 47 Ind Cas 597, *Appayya v. Venkataswami*. (1933) A I R 1933 All 649 (649) 146 Ind Cas 596, *Kirots v. Behari Lal*. (1918) 19 Ind Cas 496 (496) (Mad), *Hyder Sahib v. Garia Chettiar*.
3. See cases cited in Foot-Note 2
4. (1936) A I R 1936 Pesh 135 (136) 2 J R 16, *Lechhu Singh v. Ganesh Das*.
5. (1912) 18 Ind Cas 520 (523) 14 Oudh Cas 308, *Badruddeen Hasan v. Amir Begum*. (1935) A I R 1935 Lah 951 (951) 162 Ind Cas 124, *Manghoo Ram v. Firm Girdhari Lal Ramchand*

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governed by this Article.⁶

An award made on a reference made in a suit on the Original Side of the Bombay High Court was submitted on the 6th July 1920 and on the 16th July 1920 the defendants filed an affidavit in the Prothonotary's Office objecting to the award. On the 22nd of July they gave notice that they would move the Court on the 29th of July that the award be set aside. It was held by the High Court of Bombay that the filing of the affidavit in the Prothonotary's Office on the 16th of July must be considered to be an "an application" to set aside the award within the meaning of Article 158.⁷

3. Period of limitation. — The period of limitation is 10 days from the date specified in the third column. The object of the Legislature in allowing so short a period for the preferring of objections to awards has been stated by Mr. Justice Rampini in the undermentioned case¹ to be as follows. "Litigants may be very willing to have their cases referred to the decision of arbitrators, whom they regard as amicably disposed towards them, but the moment the arbitrators decide against them they do their utmost to resile from their agreement and to set aside the award. The Legislature has framed Article 158 of the Limitation Act with the object of discouraging and preventing such discreditable attempts. If the provisions of Article 158 are loosely interpreted, and if an award is to be held not to be an award simply because any sort of unsubstantiated objection is made against it, then the object of the Legislature will be defeated and the provisions of Article 158 will be practically erased from the Statute Book."

4. Starting point. — Till the third column of the Article was amended in 1919, the starting point was the date "when the award is submitted to the Court." There was a conflict of decisions on the question whether, in view of Paragraph 10 of Schedule 2 of the Civil Procedure Code which requires the Court to give the parties notice of filing of the award, time under the Article must, notwithstanding the third column, run only from the date of the notice.¹ The words of

6. (1902) 29 Cal 167 (185) : 29 Ind App 51 : 4 Bom L R 161 : 12 Mad L Jour 77 : 6 Cal W N 226 : 8 Sar 154 : 1902 Pun Re No. 25 (P C), *Ghulam Khan v. Muhammad Hassan*.

(1903) 12 Mad L Jour 95 (96) (Jour), Critical Note on (1902) 29 Cal 167, *Ghulam Khan v. Muhammad Hassan*

7. (1921) A I R 1921 Bom 419 (420) : 45 Bom 1071 : 68 Ind Cas 929, *Gopalji Kallianji v. Chhagan Lal Vithalji*.

Note 3

1 (1902) 29 Cal 36 (41), *Ram Narain Roy v. Baij Nath Malla*.

Note 4

1. (1914) A I R 1914 Sind 141 (143) : 8 Sind L R 190 : 27 Ind Cas 371, *Kahan Barth v. Kochanbai*. (No.)

(1912) 18 Ind Cas 234 (235) (Mad), *Narayana Nambi v. Krishnan Mossad*. (No.)

(1916) A I R 1916 Lah 321 (322) : 34 Ind Cas 250, *Jauahir Singh v. Mehr Singh*. (Date fixed for submission—Presentation of award before that date without knowledge of opposite party is not "submission".)

the third column were substituted in 1919 for the words "when the award is submitted to the Court" and it is now clear that time runs only from the date when the award is *filed in Court* and notice of the filing has been given to the parties.

Where the arbitrator states a special case for the opinion of the Court, and the Court expresses its opinion, the date on which it so expresses its opinion must be taken to be the date when the "award is filed."²

A notice can, it is submitted, be said to be *given* to a party when such party *receives* the notice.³ A mere *direction to issue notice* is not *giving* any notice.⁴ The words "where notice *has been given*" show that it is not sufficient, in order that time may begin to run, that the party has received knowledge *aliunde* of the filing of the award. The Court must have *given* notice to the parties.⁵ Where on the date on which an award was filed in Court the defendant came late and applied for time for objections and the Court informed him that a decree had been passed in terms of the award and rejected his application, it was held that it could not be said that notice had been given to the defendant of the filing of the award.⁶

A *formal* notice is, however, not necessary in order to start time running. Where the award was brought in by the parties themselves and the Court informed them that they should file their objections within 10 days, it was held that notice must be taken to have been

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- (1901) 5 Cal W N 813 (815), *Nobin Kally Dabee v. Ambica Churn Banerjee*.
(No)
- (1919) A I R 1919 Cal 224 (225) 46 Cal 721 . 53 Ind Cas 46, *Sota Chand Bhutoria v. Hurry Buz Deora* (The word "submission" must be interpreted in the light of Para. 10 of Sch. 2 of the Code and time runs only when the award is "filed," i. e. after the procedure in Para. 10 is followed.)
- (1917) A I R 1917 Nag 211 (212) 18 Nag L R 172 42 Ind Cas 266, *Seetharam v. Rupram* (Yes)
- (1915) A I R 1915 Lah 352 (352) . 28 Ind Cas 427, *Sahib Rai v. Chait Ram*.
(Yes)
- (1921) A I R 1921 All 63 (63) . 63 Ind Cas 899, *Sheo Prakash Rai v. Sri Ram Mahadeo*. (Yes.)
- (1898) 20 All 474 (475) . 1898 All W N 132, *Chatarbhuj Das v. Ganesh Ram*.
(The Court is bound to give notice of the filing of the award to the parties.)
2. (1925) A I R 1925 Bom 22 (25) 48 Bom 663 84 Ind Cas 378, *Lakshman Baburao v. Ramchandra Rajaram*.
3. See (1930) A I R 1930 All 477 (478) 126 Ind Cas 14, *Mohammad Thasim Khan v. Basant Rai*. (Quere.)
4. (1930) A I R 1930 All 477 (478) 126 Ind Cas 14, *Mahomed Thasim Khan v. Basant Rai*.
5. (1930) A I R 1930 Lah 228 (229) 119 Ind Cas 331, *Punnoo Ram v. Nebh Raj*.
- (1898) 20 All 474 (475) 1898 All W N 132, *Chatarbhuj Das v. Ganesh Ram*.
[See also (1925) A I R 1925 Lah 619 (619) 89 Ind Cas 240, *Gurditta Mal v. Firm of Bisanta Mal Panna Lal*
(1888) 11 Mad 144 (145), *Pengasamy v. Muthusamy*]
6. (1930) A I R 1930 Lah 228 (229) . 119 Ind Cas 331, *Punnoo Ram v. Nebh Raj*.

Article 158
Notes
4—6

given "to the parties".⁷ Where the Court made an order: "Inform the parties of the filing of the award," and the Bench Clerk informed the parties accordingly, it was held that notice had been given.⁸ Similarly, where the parties were shown the order recording the award and their initials taken in acknowledgment of the fact that they had notice, it was held that it was sufficient giving of notice.⁹

The word "parties" is not confined to parties *personally* but would include their pleaders and duly authorized agents. A notice to such persons therefore is notice to the parties for the purposes of this Article.¹⁰

5. Extension of time. — Section 5, Limitation Act, does not apply to applications to set aside an award and the Court has no power to enlarge the time within which such an application should be filed.¹ But where an application containing an additional ground of objection to the validity of an award is filed beyond time in addition to the one filed within time, the Court has a discretion to allow the additional ground to be added by way of amendment or to entertain it of its own motion if it thinks that the ground was such as to render a reference to arbitration or the award based thereon absolutely invalid.² Time may, however, be extended under Section 4, Limitation Act.³ The Court has power to extend the time allowed under Article 158 for supplying the necessary court-fee stamp on an application to set aside an award.⁴

6. Exclusion of time. — In computing the period of limitation, the time requisite for obtaining copy of the award can be excluded

7. (1926) A I R 1926 Bom 312 (312) : 95 Ind Cas 547, *Valchand Dipechand v. Gulba Laxman*.

8. (1927) A I R 1927 Cal 619 (621) : 103 Ind Cas 625, *Saroj Bala v. Jatindra Nath*.

9. (1927) A I R 1927 Pat 135 (139) 95 Ind Cas 321, *Bholanath Roy v. Bata Krishna Roy*
 [See also (1913) 21 Ind Cas 298 (301) (Lah), *Gulam Mustafa v. Halima Bibi*]

Jatindra Nath.
 (1927) A I R 1927 Pat 135 (139) : 95 Ind Cas 321, *Bholanath Roy v. Bata Krishna Roy*]

Note 5

1. (1914) A I R 1914 Cal 723 (724) : 17 Ind Cas 7, *Surya Narain Jha v. Banwari Jha*.

(1927) A I R 1927 Lah 273 (273) : 8 Lah 274 . 100 Ind Cas 955, *Devi Datta v. Babu Ram*.

(1917) A I R 1917 Nag 211 (212) : 13 Nag L R 172 . 42 Ind Cas 266, *Sitaram v. Rupram*.

2. (1918) 20 Ind Cas 778 (774) . 16 Oudh Cas 233, *Bhagwan Din Singh v. Fakir Singh*.

3. (1916) A I R 1916 Lah 321 (322) : 34 Ind Cas 250, *Jawahir Singh v. Mehr Singh*.

4. (1928) A I R 1928 Sind 87 (89) : 23 Sind L R 91 : 107 Ind Cas 223, *Admalji v. Abdulali*.

under the provisions of sub-section 4 of Section 12 *ante*. See Note 30 to Section 12.

7. Effect of bar.—The Court has no power to pass a decree in terms of the award before the expiry of ten days allowed by Article 158 except by consent of parties ^{1a}. If a decree is passed before that period, the procedure is illegal and the decree is liable to be set aside.¹

An objection to the validity of an award based on the reference is one which ought to be urged within 10 days as prescribed by Article 158 and when not so urged, the parties are precluded from relying on it in order to set aside the award and decree based on it ²

Article 158
Notes
6—7

159.* For leave to appear and defend a suit under the summary procedure referred to in section 128 (2) (f) or under Order 37 of the same Code.	Ten days.	When the summons is served.
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Article 159

Synopsis

1. Scope.
2. Extension of period fixed.
3. Starting point.
4. Rangoon Small Cause Court Rules 1922, Rule 101.

* Act of 1877

159 —For leave to appear and defend a suit under Chapter 39 of the Code of Civil Procedure	Ten days	When the summons is served
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Acts of 1871 and 1859

No corresponding provision.

Note 7

- 1a (1918) 21 Ind Cas 298 (301) (Lab), *Gulam Mustafa v Halima Bibi*.
 1 (1908) 5 All L Jour 36 (8 N)
 (1922) A I R 1922 Mad 179 (180) 71 Ind Cas 266 45 Mad 466, *Rengiah Chetty v Govindasamy Chetty*
 (1934) A I R 1934 Mad 619 (620) 152 Ind Cas 157, *Subba Rao v Ramalin gavya*
 (1921) A I R 1921 Oudh 148 (148) 64 Ind Cas 90 24 Oudh Cas 234, *Mani Ram v Ram Asray*
 (1921) A I R 1921 Oudh 154 (154) 62 Ind Cas 819 24 Oudh Cas 263, *Sohan Lal v Munna Lal*
 (1925) A I R 1925 Rang 103 (103) 76 Ind Cas 307, *Achabar Pandey Kuldip Singh*
 (1911) 9 Ind Cas 197 (198) (Mad), *Valu Pillai v Appasami Pandaram*
 (1928) A I R 1928 Nag 166 (167) 107 Ind Cas 668, *Ram Kumar v Kushalchand Ganeshdas*
 2. (1907) 1907 Pun W R No 20 (page 42) 1907 Pun Re No 4, *Uda v Mal Chand*

Article 159
Notes
1—4

1. Scope. — Where a summary suit is filed under the provisions of Order 37 of the Civil Procedure Code, the defendant is not entitled to appear and defend the suit unless he obtains leave of the Court to so appear and defend. (See Rule 2 of Order 37.) For this purpose he has to file an application. This Article prescribes the period of limitation for such applications

2. Extension of period fixed. — The period fixed by the Article cannot be extended by the Court under the provisions of Section 148 of the Code of Civil Procedure.¹ The High Court may, however, under its rule-making powers, extend Section 5 of this Act to applications for leave to defend and where it has been so extended, the Court may, for sufficient cause, excuse the delay in making the application. The Bombay High Court has so extended Section 5 to such applications. It has also been held by the same High Court that, under Rule 193 of the High Court Rules, a discretion is vested in the Chamber Judge, in a fit case, to extend the period of ten days in cases to which Order 37 of the Civil Procedure Code is not applicable.²

3. Starting point. — The starting point is the date when the summons is served.

A, the defendant, in his application for leave to defend alleged that he was served on 5.1.1896 and obtained an *ex parte* order granting the application. *B*, the plaintiff, applied thereafter to the Court praying that the order granting leave may be set aside on the ground that the defendant was actually served on 23.12.1895 and that the defendant's application had been made beyond time. The Sheriff's return showed that *A* was served on 23.12.1895. *A* thereupon wanted to show that he was not served at all. It was held that, at that stage, *A* could not be allowed to do so, that the date of service must be taken to be the date mentioned in the Sheriff's return, and that the order granting the leave should be set aside.¹

4. Rangoon Small Cause Court Rules 1922, Rule 101. — It has been held by the High Court of Rangoon that Rule 101, in so far as it curtails the period of ten days prescribed by this Article for an application for leave to defend, is *ultra vires* to that extent.¹

Article 159 — Note 2

1. (1901) 5 Cal W N 259 (262), *Quasim Mahumdar Rohman v. Saai Chundra Dutt*
2. (1926) A I R 1926 Bom 578 (578) 97 Ind Cas 766, *Mohanlal Manordas v. C K. Daricwala*.

Note 3

1. (1896) 23 Cal 573 (575), *Madhub Lall Durgur v. Woopendra Narain Sen*.

Note 4

1. (1936) A I R 1936 Rang 501 (503) : 166 Ind Cas 148 : 14 Rang 729, *Ratilal Jamnadas Mehta v. V. Praggjee*.

160.* For an order under the same Code, to restore to the file an application for review rejected in consequence of the failure of the applicant to appear when the application was called on for hearing.	Fifteen days.	When the application for review is rejected.	Article 160
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Synopsis

1. Scope of the Article.

2. Starting point.

1. Scope of the Article.—This Article prescribes the period of limitation for applications under Order 47 Rule 7 sub-rule 2 of the Code of Civil Procedure which provides as follows :

"Where the application" (i.e. the application for review) "has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for hearing the same."

2. Starting point.—The starting point is the date of rejection of the application

The period fixed by the Article cannot be extended by the Court on any ground.¹ See Notes to Section 3, *ante*

161.† For a review of judgment by a Provincial Court of Small Causes or by a Court invested with the jurisdiction of a Provincial Court of Small Causes when exercising that jurisdiction.	Fifteen days.	The date of the decree or order.	Article 161
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*

Act of 1877

160 - For an order under section 629 of the same Code restoring to the file a rejected application for review

Fifteen days

When the application for review is rejected

Acts of 1871 and 1859

No corresponding provision

Act of 1877, Article 160 A.

Same as above.

Article 160 — Note 2

1. See (1915) A I R 1915 Lah 176 (176) 27 Ind Cas 703, *Kalu v. Sowaria*.

Article 161
Notes
1—4

Synopsis

1. Legislative changes.
2. Court of Small Causes.
3. "Review," meaning of.
4. Security deposit.

1. Legislative changes.

1. This Article was inserted as Article 160 A by Section 36 of Act 9 of 1887. Before the Article was so inserted, an application for review, in cases where the circumstances admitted of a new trial, had to be made within seven days of the date of the order under Act 21 of 1865. In other cases the application was governed by Article 173 of the Act of 1877 corresponding to this Article¹

2. The words in the second column were substituted for the word "Ditto" by Section 2 and Schedule 1 of the Repealing and Amending Act 9 of 1923.

2. **Court of Small Causes.** — Under Section 24 sub-section 4 of the Civil Procedure Code, a Court trying any suit transferred or withdrawn from a Court of Small Causes is, for the purposes of such suit, deemed to be a Court of Small Causes.¹

3. "Review," meaning of. — See Article 162 *infra*.

4. **Security deposit.** — Section 17 of the Provincial Small Cause Courts Act 9 of 1887 requires that an applicant for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree or compliance with the judgment, as the Court may, on a previous application made by him in this behalf, have directed. The words "or in pursuance of the judgment" are to be read distributively and applied to the words "for a review of the judgment" which precede it.¹ There was a divergence of opinion among the different High Courts before the Section was amended by Act 9 of 1935, as to whether the deposit of the decretal amount or

Acts of 1871 and 1859

No corresponding provision.

Article 161 — Note 1

1. (1884) 10 Cal 297 (298), *Modon Mohun Poddar v. Purno Chunder Purbot*

Note 2

1. See (1917) A I R 1917 All 484 (485) : 33 All 425 : 34 Ind Cas 113, *Chhotey Lal v. Lakshmi Chand*.

Note 4

1. (1923) A I R 1923 All 605 (606) : 45 All 569 : 74 Ind Cas 64, *Girdhar Lal v. Firm Jchal Singh Takhat Singh*.

the furnishing of security was a condition precedent to the entertaining of the application. See the undermentioned cases² which are now only of academical interest.

As to the applicability of Section 5 to applications for review of the judgment of a Court of Small Causes, see Notes to Section 5 *ante*.

Article 161.
Note 4

162.* For a review of judgment by any of the following Courts, namely, the High Courts of Judicature at Fort William, Madras, Bombay, Lahore, and Nagpur and the Chief Court of Sind in the exercise of its original jurisdiction.	Twenty days.	The date of the decree or order.
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Article 162

*

Act of 1877

162.—For a review of judgment by any of the High Courts of Judicature at Fort William, Madras and Bombay, or the Chief Court of the Punjab, or the Chief Court of Lower Burma, in the exercise of its original jurisdiction.	Twenty days	The date of the decree or order
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Acts of 1871 and 1859

No corresponding provision

- 2 (1906) 28 All 470 (472, 473) 3 All L Jour 318 1906 All W N 93, *Jagan Nath v. Chet Ram* (Proviso to S 17 is mandatory and deposit of security is condition precedent to entertaining of application)
- (1928) A I R 1928 All 111 (111) 50 All 254 108 Ind Cas 464, *Suraj Prasad Baldeo* (Do)
- (1891) 18 Cal 83 (85), *Jogi Ahir v. Bishen Dayal Singh* (Do)
- (1917) A I R 1917 Cal 195 (196) 42 Ind Cas 751, *Tarapada Ghose v. Jagat Mohini Das* (Do)
- (1922) A I R 1922 Mad 330 (332) 70 Ind Cas 496, *Bala Krishna Iyer v. Pichai Muthu Pillai* (Do)
- (1920) A I R 1920 Pat 111 (112) 56 Ind Cas 610, *Ram Charitar Ram v. Hashim Khan* (Do)
- (1920) A I R 1920 Pat 470 (471) 54 Ind Cas 971, *Khantar Potdar v. Punni Naddaf* (Do)
- (1926) A I R 1926 Oudh 544 (544) 97 Ind Cas 581, *Dunia Din v. Farzand Husain* (Do)
- (1930) A I R 1930 Nag 137 (137) 26 Nag L R 63 116 Ind Cas 641, *Chandulal v. Motilal Bansilal* (Do)
- (1933) A I R 1933 Nag 102 (103) 141 Ind Cas 613 29 Nag L R 104, *Maniklal Varma v. Khushal Mali* (Do)
- (1910) 6 Ind Cas 945 (945, 946) 1910 Pun Re No 54, *Rughu Nath Das v. Doctor Panna Lal* (The words 'At the time of presenting the application' in the Proviso to Section 17 are directory and the Court has the discretion to extend the time in appropriate cases)
- (1930) A I R 1930 All 830 (831) 128 Ind Cas 765 53 All 59, *Moti Lal Ramchandrar v. Durga Prasad* (Do)
- (1919) A I R 1919 Lah 124 (125) 50 Ind Cas 917, *Mulandil Lal v. Pars Ram*. (Do)

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Review."
4. "Original jurisdiction."
5. Application for review, when maintainable.
6. Starting point.

1. **Legislative changes.** — This Article was first enacted as Article 162 of Act 15 of 1877.

The words "the following Courts, namely" were inserted by Section 2 and Schedule 1 of the Repealing and Amending Act, 1927 (10 of 1927).

The words "Bombay, Lahore, Rangoon and Nagpur and the Chief Court of Sind" were substituted for the words "and Bombay or the Chief Court of Sind, or the Chief Court of Punjab or the Chief Court of Lower Burma" by the Repealing and Amending Act of 1927 and by Section 2 of the Central Provinces Courts (Supplementary) Act 8 of 1935.

The word "Rangoon" was omitted by the Government of India (Adaptation of Indian Laws) Order, 1937.

2. **Scope of the Article.** — Article 161 *ante* provides for applications for review of judgments of Small Cause Courts. This Article deals with applications for review of the judgments of the Courts specified in the Article in the exercise of their original jurisdiction. Article 173 *infra* deals with applications for review of judgments except those specified in Article 161 and this Article.

The Article applies only to *applications* for review. A *certificate* of the Advocate-General under Clause 26 of the Letters Patent (Cal) is not an *application* and consequently, a review made on such *certificate* is not governed by this Article.¹ Nor will this Article

(1931) A I R 1931 Lah 332 (334) . 181 Ind Cas 635 . 12 Lah 339 (F B), *Geda Mal Dharam Das v. Huna Mal Shedhu Ram.* (Do.)

(1890) 18 Mad 178 (188) (F B), *Ramasami v. Kurisu.* (Do.)

(1919) A I R 1919 Mad 103 (103) : 53 Ind Cas 926, *Akula Achiah v. Lakshminarasimham.* (Do.)

(1920) A I R 1920 Mad 141 (142) . 55 Ind Cas 618, *Suryanarayana Iyer v. Soundararaja Iyengar.* (Do)

(1927) A I R 1927 Nag 165 (166) : 99 Ind Cas 779, *Vithu Mhalis v. Vithu Mahadji.* (Do)

(1920) A I R 1920 Mad 562 (563) : 43 Mad 579 . 55 Ind Cas 977 (F B), *Assan Md Sa'ib v. Rahman Sa'ib.* (The words are directory to this extent that the deposit of security need not be made or tendered with the application, but this can be done within the period of limitation but not beyond it)

(1905) 32 Cal 339 (342) . 1 Cal L Jour 43, *Jenn Muchi v. Budhram Muchi.* (Do)

(1894) 1894 Pun Re No 108, *Muhammad Fazal Ali v. Karim Khan.*

Article 162 — Note 2

1 (1929) A I R 1929 Cal 617 (622) . 30 Cri L Jour 993 : 119 Ind Cas 193 : 1929 Cri Cas 228 (S B), *Padam Prashad v. Emperor.*

govern a case where the Court reviews its judgment under its inherent powers.²

Article 162
Notes
2—4

3. "Review."—The word "review" would *prima facie* seem to include a review, whether under the Civil Procedure Code or under any other enactment. Thus, an application for review under Section 8 of the Presidency Towns Insolvency Act (3 of 1909) would be governed by this Article. This is the view of the High Court of Madras.¹ The High Court of Rangoon has, however, in the undermentioned case² held that the word "review" in this Article as well as in Article 173 must be confined to a review under Order 47 Rule 1 of the Civil Procedure Code and that it does not include a review under Section 8 of the Presidency Towns Insolvency Act. It is submitted that this view is not correct. No reason is mentioned in the said decision for departing from the application of the cardinal principle of interpretation of statutes that words must be construed according to their *plain meaning*, unless by reason of such construction there is a repugnancy with the other provisions of the statute.

It has been held that the High Court has, under the Criminal Procedure Code, no right of review in criminal cases, and that its inherent powers in such matters do not extend to reviewing a judgment.³ No question of the applicability of this Article would arise in such cases. See also Note 3 to Article 173, *infra*.

4. "Original jurisdiction."—The original jurisdiction of the Chartered High Courts is derived from the Letters Patents issued to them. The original jurisdiction of the Judicial Commissioner's Court of Sind is derived from the provisions of the Sind Courts Act (Bombay Act 12 of 1866).

It has been held that the original jurisdiction of the Chartered High Courts would include matrimonial¹ and insolvency jurisdiction.²

- 2 (1929) A I R 1929 Oudh 385 (387) 118 Ind Cas 753 4 Luck 562 (F B), *Mahomed Raza v. Ram Saroop*
[See (1901) 28 Cal 680 (684) 6 Cal W N 114, *Puran Mal v. Janki Pershad Singh*]

Note 3

1. (1924) A I R 1924 Mad 662 (665) 83 Ind Cas 174, *Official Assignee of Madras v. Official Assignee of Rangoon*
2. (1929) A I R 1929 Rang 229 (232) 118 Ind Cas 117 7 Rang 201, *In the matter of L. W. Nasree*
3. (1928) A I R 1928 Lab 462 (463) 10 Lab 1 29 Cri L Jour 669 110 Ind Cas 221, *Paju v. Emperor*
[See also (1928) A I R 1928 Cal 367 (368) 56 Cal 32 114 Ind Cas 132 30 Cri L Jour 254 *Pameshar Ahuorwalla v. Emperor* (High Court should not under Sec 401, Criminal P C re try questions already determined on its Original Side)]

Note 4

1. (1882) 6 Bom 416 (434), *Harriett A King v. James S. King*
2. (1889) 13 Bom 520 (533) 10 Ind App 154 10 Ind Jour 251 (P C), *In the matter of Captain Dutt Narayan*

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Review."
4. "Original jurisdiction."
5. Application for review, when maintainable.
6. Starting point.

1. **Legislative changes.**— This Article was first enacted as Article 162 of Act 15 of 1877.

The words "the following Courts, namely" were inserted by Section 2 and Schedule 1 of the Repealing and Amending Act, 1927 (10 of 1927).

The words "Bombay, Lahore, Rangoon and Nagpur and the Chief Court of Sind" were substituted for the words "and Bombay or the Chief Court of Sind, or the Chief Court of Punjab or the Chief Court of Lower Burma" by the Repealing and Amending Act of 1927 and by Section 2 of the Central Provinces Courts (Supplementary) Act 8 of 1935.

The word "Rangoon" was omitted by the Government of India (Adaptation of Indian Laws) Order, 1937.

2. **Scope of the Article.**— Article 161 *ante* provides for applications for review of judgments of Small Cause Courts. This Article deals with applications for review of the judgments of the Courts specified in the Article in the exercise of their original jurisdiction. Article 173 *infra* deals with applications for review of judgments except those specified in Article 161 and this Article.

The Article applies only to *applications* for review. A *certificate* of the Advocate-General under Clause 26 of the Letters Patent (Cal) is not an *application* and consequently, a review made on such certificate is not governed by this Article.¹ Nor will this Article

(1931) A I R 1031 Lah 332 (334) : 131 Ind Cas 635 · 12 Lah 359 (F B), *Gedi Mat Dharam Das v. Huna Mat Shedku Ram* (Do.)

(1890) 13 Mad 178 (188) (F B), *Ramasami v. Kurisu*. (Do.)

(1919) A I R 1919 Mad 103 (103) : 53 Ind Cas 926, *Ahula Achiah v. Lakshminarasimham*. (Do)

(1920) A I R 1920 Mad 141 (142) · 55 Ind Cas 618, *Suryanarayana Iyer v. Soundararaja Iyengar*. (Do)

(1927) A I R 1927 Nag 165 (166) : 99 Ind Cas 779, *Vithu Mahli v. Vithu Mahady*. (Do)

(1920) A I R 1920 Mad 562 (563) · 43 Mad 579 : 55 Ind Cas 977 (F B), *Assan Md Sahib v. Rahman Sahib*. (The words are directory to this extent that the deposit of security need not be made or tendered with the application, but this can be done within the period of limitation but not beyond it)

(1905) 32 Cal 309 (342) · 1 Cal L Jour 43, *Jeun Muchi v. Budhiram Muchi*. (Do.)

(1894) 1894 Pun Re No. 103, *Muhammad Fazal Ali v. Karim Khan*.

Article 162 — Note 2

1 (1929) A I R 1929 Cal 617 (622) · 30 Cri L Jour 993 · 119 Ind Cas 193 : 1929 Cri Cas 228 (S B), *Padam Prashad v. Emperor*.

Other Topics

Dismissal for default of appearance ...	...	See Note 2, Pts 1 to 3
Dismissal for default without jurisdiction—Article does not apply ...	See Note 5, Pts 1, 2	
Dismissal for failure to furnish security for costs ...	See Note 2	
Dismissal for failure to pay costs of service of process ...	See Note 2	
Order pronouncing judgment under O 10 R 4, C. P. C. ...	See Note 2, Pts. 2, 3	
Plaintiff not aware of dismissal—Starting point not affected	See Note 8, Pt	
Plaintiff's death subsequent to dismissal for default—Legal representative does not get fresh starting point ...	See Note 4, Pts. 1, 2	

Article 163 Notes 1—2

1. Legislative changes.

1. There was no Article corresponding to this Article in the Act of 1859
- 2 Article 156 of the Act of 1871 corresponding to this Article provided merely for an order to set aside a *judgment by default*.
- 3 Article 163 of the Act of 1877 substituted the words "dismissal by default" for the words "judgment by default."

2. Scope of the Article. — Article 168 *infra* applies to an application for the re-admission of an *appeal* dismissed for want of prosecution. This Article applies to an application by a *plaintiff* for an order to set aside

- 1 a dismissal for default of appearance,
- 2 a dismissal for failure to pay costs of service of process, and
3. a dismissal for failure to furnish security for costs.

Dismissal for default of appearance :

An order of dismissal of a suit for default of appearance may be made under Rules 3, 8 and 12 of Order 9 of the Code of Civil Procedure Rule 3 provides that where *neither party appears* when the suit is called on for hearing, the Court may make an order that the suit be dismissed Rule 4 of the said Order empowers the plaintiff in such a case to apply to have the dismissal set aside. Rule 8 provides that where the *defendant* appears but the plaintiff does not appear the Court shall make an order that the suit be dismissed and Rule 9 empowers the plaintiff in such a case to apply to have the order of dismissal set aside. Rule 12 provides that where a plaintiff or defendant, who has been ordered to appear in person or show sufficient cause to the satisfaction of the Court, fails so to appear, he shall be subject to all the provisions of the previous Rules applicable to plaintiffs and defendants respectively who do not appear An application under Rule 4 or Rule 9 of Order 9 would be governed by this Article.¹

Under Order 10 Rule 4 of the Civil Procedure Code the Court can, under the circumstances specified therein, direct a party to appear in Court on a particular date and can, on his failure so to appear

Article 163 — Note 2

1. See (1896) 2 Cal W N 318 (319), *Kailash Mondal v. Nabadwip Chandra Kar.* (Rule 4.)
(1903) 31 Cal 130 (131) : 8 Cal W N 97, *Hingabbee v. Munna Bhee.* (Rule 9.)

Article 162
Notes
5-6

5. Application for review, when maintainable. — See Section 114 and Order 47 Rule 1 of the Civil Procedure Code, and the decisions thereon.

6. Starting point. — Time, under this Article, runs from the date of the decree or order sought to be reviewed. The date of the decree is the date of the judgment. See Note 5 to Article 156, *ante*. Where, under the practice of the High Court a party has to apply to have the order drawn up and he fails to do so, he cannot escape the bar of limitation by reason merely of the fact that the order has not been drawn up.¹

Article 163

163.* By a plaintiff for an order to set aside a dismissal for default of appearance or for failure to pay costs of service of process or to furnish se- curity for costs.	Thirty days.	The date of the dismis- sal.
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Application.
4. "By a plaintiff."
5. "To set aside a dismissal."
6. "Appearance," meaning of.
7. Application for restoration itself dismissed for default.
8. Starting point.
9. Section 5 and this Article.
10. Section 12 and this Article.
11. Section 14 and this Article.
12. Court's inherent power to extend time.

* Act of 1877

163 — By a plaintiff for an order | Thirty days. | The date of the dismissal.
to set aside a dismissal by default.

Act of 1871

156 — By a plaintiff for an order | Thirty days | The date of the judgment.
to set aside a judgment by default

Act of 1859

No corresponding provision.

(1928) A I R 1928 Mad 732 (733) 51 Mad 510 : 112 Ind Cas 149 (F B), *In the matter of Kencherla Krishna Rao*.

Note 6

1. (1938) A I R 1938 Cal 321 (323) : I L R (1938) 2 Cal 22, *Ritchson v. Ritchson*.

Other Topics

Article 163 Notes 1—2

Dismissal for default of appearance ...	See Note 2, Pts. 1 to 3
Dismissal for default without jurisdiction—Article does not apply ...	See Note 5, Pts. 1, 2
Dismissal for failure to furnish security for costs ...	See Note 2
Dismissal for failure to pay costs of service of process ...	See Note 2
Order pronouncing judgment under O 10 R 4, C. P. C. .	See Note 2, Pts. 2, 3
Plaintiff not aware of dismissal—Starting point not affected	See Note 8, Pt.
Plaintiff's death subsequent to dismissal for default—Legal representative does not get fresh starting point ...	See Note 4, Pts. 1, 2

1. Legislative changes.

1. There was no Article corresponding to this Article in the Act of 1859.
2. Article 156 of the Act of 1871 corresponding to this Article provided merely for an order to set aside a *judgment by default*.
3. Article 163 of the Act of 1877 substituted the words "dismissal by default" for the words "judgment by default."

2. Scope of the Article. — Article 163 *infra* applies to an application for the re-admission of an *appeal* dismissed for want of prosecution. This Article applies to an application by a *plaintiff* for an order to set aside

1. a dismissal for default of appearance,
2. a dismissal for failure to pay costs of service of process, and
3. a dismissal for failure to furnish security for costs.

Dismissal for default of appearance *

An order of dismissal of a suit for default of appearance may be made under Rules 3, 8 and 12 of Order 9 of the Code of Civil Procedure. Rule 3 provides that where *neither party appears* when the suit is called on for hearing, the Court may make an order that the suit be dismissed. Rule 4 of the said Order empowers the plaintiff in such a case to apply to have the dismissal set aside. Rule 8 provides that where the *defendant* appears but the plaintiff does not appear the Court shall make an order that the suit be dismissed and Rule 9 empowers the plaintiff in such a case to apply to have the order of dismissal set aside. Rule 12 provides that where a plaintiff or defendant, who has been ordered to appear in person or show sufficient cause to the satisfaction of the Court, fails so to appear, he shall be subject to all the provisions of the previous Rules applicable to plaintiffs and defendants respectively who do not appear. An application under Rule 4 or Rule 9 of Order 9 would be governed by this Article ¹

Under Order 10 Rule 4 of the Civil Procedure Code the Court can, under the circumstances specified therein, direct a party to appear in Court on a particular date and can, on his failure so to appear

Article 163 — Note 2

1. See (1896) 2 Cal W N 318 (319), *Koilash Mondal v. Nabadurip Chandra Kar.* (Rule 4.)
(1903) 31 Cal 150 (154) 8 Cal W N 97, *Hingabhee v. Munna Bhee.* (Rule 9)

Article 163
Note 2

without lawful excuse, pronounce judgment against him. An order pronouncing judgment against a party under that Rule is appealable as an order under the provisions of Order 43 of the Code. The question has, however, arisen as to whether such an order may be considered to have been made under the provisions of Order 9 of the Code. According to the High Court of Madras such an order must be taken to have been made only under Order 10 Rule 4 and not under Order 9 and therefore no *application* will lie to set the order aside.² The High Court of Allahabad has, on the other hand, held that such an order, made where the plaintiff and his pleader are both absent, must be considered to have been passed only under the provisions of Order 9 and that therefore an application will lie to set the order aside.³ If in such cases an application will lie to set aside the order of dismissal, it is conceived that this Article will apply to such applications.

Dismissal for failure to pay costs of service of process :

An order of dismissal of a suit for failure to pay costs of service of process is made under Order 9 Rule 2 of the Civil Procedure Code which runs as follows :—

“Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed.

“Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer, he attends in person or by agent when he is allowed to appear by agent.”

Rule 4 of the Order empowers the plaintiff, where such an order of dismissal has been made, to apply to have the order set aside, and such an application also would be governed by this Article.

Dismissal for failure to furnish security for costs :

Order 25 Rule 1 of the Civil Procedure Code empowers the Court, in the circumstances mentioned therein, to call upon the plaintiff to furnish security for the costs of the suit. Rule 2 sub-rule 1 of that Order provides that on the failure of the plaintiff to furnish such security, the Court shall make an order dismissing the suit. Sub-rule 2 of Rule 2 however enables the plaintiff to apply to have the order set aside, and such an application also will be governed by this Article. Order 22 Rule 8 of the Civil Procedure Code empowers the Court under certain circumstances to order the assignee or the Receiver of an insolvent plaintiff to furnish security for costs and to dismiss the suit on default of furnishing such security. Rule 9 of that Order provides for an application by the assignee or the Receiver to

2. (1921) A I R 1921 Mad 417 (418) : 63 Ind Cas 961, *Chengara Chandu v. Chengara Raman Nair*.

3. (1917) A I R 1917 All 136 (136) : 42 Ind Cas 945, *Chunni Lal v. Chakherphan*.
(1932) A I R 1932 All 595 (596) : 139 Ind Cas 618, *Nandan Sahu v. Hari Shankar*.

set aside the order of dismissal. Such an application is, however, not within this Article as it cannot be said to be an application by *the plaintiff*, and also as a specific Article, namely Article 172, prescribes the limitation for such cases.

3. Application.—An application to the Registrar of the Original Side for the issue of a notice of motion under Rules 154 and 155 of the Original Side Rules of the Madras High Court is an application within the meaning of this Article. The fact that the affidavit supporting the application was sworn later, or because the notice of motion states a date which is beyond the statutory period as the date on which the application will be heard, will not affect the validity of the application.¹

4. "By a plaintiff." — Where a suit is dismissed for default of the plaintiff's appearance, and subsequently the plaintiff dies, his legal representative does not get a fresh starting point for an application to set aside the dismissal. His application will, therefore, be barred under this Article if it is made beyond thirty days of the order of dismissal.¹ It has been held by the Judicial Commissioner's Court of Oudh that even where a Court dismissed the suit for default in ignorance of the death of the plaintiff, it was necessary for the legal representatives of the plaintiff to apply to set aside the dismissal within the time prescribed by this Article.²

5. "To set aside a dismissal." — The Article will apply only to a case where it is necessary for a plaintiff to set aside a dismissal for default against him. Where a dismissal for default is *without jurisdiction*, it is not necessary that it should be set aside within the thirty days prescribed by this Article. Where the plaintiff in a representative suit died and the Court dismissed the suit on the ground that other constructive plaintiffs failed to appear, it was held that the Court had no jurisdiction to make such an order and that it need not be set aside within the period prescribed by this Article.¹ Similarly, where no date was fixed for the hearing of the suit and no notice was given to the plaintiff of any such date, but the Court dismissed the suit for default, it was held that the application to set aside the dismissal was not one under Order 9 Rule 9, but one under Section 151 of the Civil Procedure Code, and was governed not by this Article, but by Article 181.²

Note 3

- 1 (1907) 17 *Mad L Jour* 215 (216), *S P R S Kuttayan Chetty v Ellappa Chetty*

Note 4

1. (1938) 146 *Ind Cas* 1001 (1002) (Oudh), *Dhanpat Des v. Ram Rachhpai Singh*
2. (1912) 14 *Ind Cas* 711 (713) (Oudh), *Debi Bakhsh Singh v Habib Shah*
(1912) 14 *Ind Cas* 221 (222) (Oudh), *Habib Shah v Debi Bax Singh*

Note 5

- 1 (1931) A I R 1931 *Mad* 590 (591, 592) 54 *Mad* 770 132 *Ind Cas* 2-9, *Muhammad Kanni Rautier v. Naina Muhammad Rautier*
2 (1935) A I R 1935 *Pesh* 186 (188) 160 *Ind Cas* 457, *Mt Zainab Bibi v. Bihari Lal*

Article 163
Notes
6—9

6. "Appearance," meaning of. — See Order 3 Rule 1 of the Civil Procedure Code and the Notes thereunder in the Authors' Commentaries on the Civil Procedure Code.

7. Application for restoration itself dismissed for default. — Where a suit is dismissed for default and an application for restoration thereof is also dismissed for default, the applicant is not debarred from making a fresh application for restoration of the suit, provided it is made within the period prescribed by this Article.¹ Suppose now that the applicant applies for restoration of the application which was itself dismissed for default. Is such an application maintainable at all? And if maintainable, what is the period of limitation applicable to such applications? As to the first question there is a conflict of opinion among the various High Courts for a discussion of which see the General Note 2 under Order 9 of the Authors' Commentaries on the Civil Procedure Code (Second Edition).

In the undermentioned case² it was held that such an application did not lie, but the application was treated as a second application to set aside the order of dismissal of the suit itself. As to the second question, there appear to be no decided cases on the point, but on principle it is conceived that this Article would not apply inasmuch as the application would not be one by the *plaintiff* in such cases. Thus would result in the application being governed by Article 181 of the Act which gives a period of three years, a result which would not have been contemplated by the Legislature. It is submitted that the absurdity of this result is an argument in favour of the view that Order 9 Rule 9 cannot be applied to an application to restore another application dismissed for default.

8. Starting point. — Time, under this Article, runs from the date of dismissal. There is nothing in the Article about the date of knowledge as there is in Article 164. Hence an application filed beyond thirty days of the date of dismissal is barred, even though the plaintiff was not aware of the dismissal.¹

9. Section 5 and this Article. — Section 5 of the Act has been made applicable to applications under Order 9 Rules 4 and 9 by the High Court of Bombay. An application under the said Rules may, in Bombay, be admitted after the period of limitation prescribed by this Article if the applicant satisfies the Court that there was sufficient cause for not making it within the period.¹ In other

Note 7

1. See (1914) A I R 1914 Mad 439 (438) : 22 Ind Cas 689, *Subba Rao v. Venkataratnam*. (In this case, however, the application was dismissed as having been made more than two months after the dismissal of the suit.)
2. (1927) A I R 1927 Cal 405 : 103 Ind Cas 61, *Siral Krishna Das v. Bhatwadekar* (Mdra).

Note 8

1. (1933) A I R 1933 Pat 557 (556) : 147 Ind Cas 179, *Deccruze v. Mrs. Pitts*.

9

1. (1929) A I R 1929 Bom 262 (2 Bom 453 : 122 Ind Cas 121), *nath v. Thakoredas*.

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Provinces where Section 5 has not been made applicable to such applications, a delay in presenting them cannot be excused under Section 5 of the Act.²

Article 163
Notes
9—11

10. Section 12 and this Article. — The time requisite for obtaining a copy of the order dismissing a suit for default cannot be excluded under Section 12 of the Act in computing the period of thirty days prescribed by this Article¹

11. Section 14 and this Article. — Section 14 of the Act of 1877 provided that in computing the period of limitation for an application, the time during which the applicant was prosecuting with due diligence another application in a wrong Court could be excluded. It was held in a case arising under that Act that time during which an applicant in an application under Section 102 of the Code (Order 9 Rule 8) was prosecuting a suit in a wrong Court could not be excluded.¹ Under the present Section 14, such period can, if the other conditions of that Section are satisfied, be excluded.

It was held by the High Court of Calcutta in the undermentioned case² that the time spent in obtaining copies of the judgment and order for the purposes of appeal under the wrong impression that an appeal lay may be excluded as time spent in prosecuting another proceeding in a wrong Court.

In *Veerayya v. Sreesailam*,³ the High Court of Madras has held in a similar case that though the period of obtaining copies might be excluded under Section 14, the period after obtaining copies and before filing the appeal in the wrong Court cannot be excluded under that Section

[But see (1925) A I R 1925 Bom 521 (521) 44 Bom 839 90 Ind Cas 610, *Mahadeo v. Lakshminarayan* (This case was, before Section 5 was extended to applications under Order 9 Rule 9)]

2 (1929) A I R 1929 All 127 (128) 51 All 487 113 Ind Cas 767, *Kali Prasad v. Parameswar Prasad*

erayya v. Sreesailam.

Ind Cas 193, *Saba v.*

Dayaram.

(1933) A I R 1933 Pat 557 (558) 147 Ind Cas 179, *D'Cruze v. Mrs. Pitts.*

(1924) A I R 1924 Rang 274 (275) 82 Ind Cas 418, *S. G. M. Samson v. Siltaran.*

(1925) A I R 1925 Rang 187 (188) 2 Rang 655 85 Ind Cas 824, *Ma Naw v. Somasundaram Chetty*

[See however (1923) A I R 1923 Mad 489 (490) 72 Ind Cas 13, *Kalyanasundarappa v. Chinnasamy*]

Note 10

1. (1926) 93 Ind Cas 1023 (1023) (Lab), *Mohan Lal v. Sher Muhammad Khan.*

Note 11

1. (1886) 1886 Pnn Re No 63, *Sheoji Ram v. Sheo Chand Roy*

2. (1910) 7 Ind Cas 775 (776, 777) (Cal), *Lakshiram Vandal v. Soratun, Pavar.*

3. (1928) A I R 1928 Mad 556 (557) 110 Ind Cas 47.

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Notes
6—9

6. "Appearance," meaning of. — See Order 3 Rule 1 of the Civil Procedure Code and the Notes thereunder in the Authors' Commentaries on the Civil Procedure Code.

7. Application for restoration itself dismissed for default. — Where a suit is dismissed for default and an application for restoration thereof is made by the applicant, he is debarred from providing it is r

Suppose now that the applicant applies for restoration of the *application* which was itself dismissed for default. Is such an application maintainable at all? And if maintainable, what is the period of limitation applicable to such applications? As to the first question there is a conflict of opinion among the various High Courts for a discussion of which see the General Note 2 under Order 9 of the Authors' Commentaries on the Civil Procedure Code (Second Edition).

In the undermentioned case² it was held that such an application did not lie, but the application was treated as a second application to set aside the order of dismissal of the suit itself. As to the second question, there appear to be no decided cases on the point, but on principle it is conceived that this Article would not apply inasmuch as the application would not be one by the *plaintiff* in such cases. This would result in the application being governed by Article 181 of the Act which gives a period of three years, a result which would not have been contemplated by the Legislature. It is submitted that the absurdity of this result is an argument in favour of the view that Order 9 Rule 9 cannot be applied to an application to restore another application dismissed for default.

8. Starting point. — Time, under this Article, runs from the *date of dismissal*. There is nothing in the Article about the date of *knowledge* as there is in Article 164. Hence an application filed beyond thirty days of the date of dismissal is barred, even though the plaintiff was not aware of the dismissal.¹

9. Section 5 and this Article. — Section 5 of the Act has been made applicable to applications under Order 9 Rules 4 and 9 by the High Court of Bombay. An application under the said Rules may, in Bombay, be admitted after the period of limitation prescribed by this Article if the applicant satisfies the Court that there was sufficient cause for not making it within the period.¹ In other

Note 7

1 See (1914) A I R 1914 Mad 438 (498) : 22 Ind Cas 689, *Subba Rao v. Venkataratnam*. (In this case, however, the application was dismissed as having been made more than two months after the dismissal of the suit.)

2. (1927) A I R 1927 Cal 534 (536) : 54 Cal 405 : 103 Ind Cas 69, *Sarat Krishna Bose v. Bisweswar Mitra*.

Note 8

1. (1933) A I R 1933 Pat 557 (558) : 147 Ind Cas 179, *Decruze v. Mrs. Pitts*.

Note 9

1. (1929) A I R 1929 Bom 262 (263) : 53 Bom 453 : 122 Ind Cas 76, *Pandarinath v. Thakoredas*.

Provinces where Section 5 has not been made applicable to such applications, a delay in presenting them cannot be excused under Section 5 of the Act.²

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9—11

10. Section 12 and this Article. — The time requisite for obtaining a copy of the order dismissing a suit for default cannot be excluded under Section 12 of the Act in computing the period of thirty days prescribed by this Article.¹

11. Section 14 and this Article. — Section 14 of the Act of 1877 provided that in computing the period of limitation for an application, the time during which the applicant was prosecuting with due diligence another application in a wrong Court could be excluded. It was held in a case arising under that Act that time during which an applicant in an application under Section 102 of the Code (Order 9 Rule 8) was prosecuting a suit in a wrong Court could not be excluded.¹ Under the present Section 14, such period can, if the other conditions of that Section are satisfied, be excluded.

It was held by the High Court of Calcutta in the undermentioned case² that the time spent in obtaining copies of the judgment and order for the purposes of appeal under the wrong impression that an appeal lay may be excluded as time spent in prosecuting another proceeding in a wrong Court.

In *Veerayya v. Sreesailam*,³ the High Court of Madras has held in a similar case that though the period of obtaining copies might be excluded under Section 14, the period after obtaining copies and before filing the appeal in the wrong Court cannot be excluded under that Section.

[But see (1925) A I R 1925 Bom 521 (521) 44 Bom 839 90 Ind Cas 610, *Mahadeo v. Lakshminarayan* (This case was, before Section 5 was extended to applications under Order 9 Rule 9.)]

2 (1920) A I R 1920 All 127 (128) 51 All 487 113 Ind Cas 767, *Kali Prasad v. Parameshwar Prasad*

(1902) 1902 Pun Re No. 83, *Sahib Ditta v. Roda*.

(1897) 1897 Pun Re No. 15, *Nur Muhammad v. Dina*

(1879) 1879 Pun Re No. 141, *Mah v. Jivan*

(1928) A I R 1928 Mad 556 (557) 110 Ind Cas 47, *Veerayya v. Sreesailam*.

(1928) A I R 1928 Nag 91 (92) 23 Nag L R 183 107 Ind Cas 193, *Saba v. Dayaram*.

(1933) A I R 1933 Pat 557 (558) 147 Ind Cas 179, *D'Cruze v. Mrs. Pitts*

(1924) A I R 1924 Rang 274 (275) 82 Ind Cas 418, *S. G. M. Samson v. Sitaran*.

(1925) A I R 1925 Rang 187 (188) 2 Rang 655 85 Ind Cas 324, *Ma Nate v. Somasundaram Chetty*.

[See however (1923) A I R 1923 Mad 489 (490) 72 Ind Cas 13, *Kalyanasundarappa v. Chinnasamy*]

Note 10

1. (1926) 93 Ind Cas 1023 (1023) (Lab), *Mohan Lal v. Sher Muhammad Khan*.

Note 11

1. (1886) 1886 Pun Re No. 63, *Sheoji Ram v. Sheo Chand Rou*

2. (1910) 7 Ind Cas 775 (776, 777) (Cal), *Lakshiram Mandal v. Seratun Basar*.

3. (1928) A I R 1928 Mad 556 (557) 110 Ind Cas 47.

Article 163
Note 12

12. Court's inherent power to extend time. — A Court has no inherent power to extend the period of limitation under this Article.¹ See also Notes 3 and 28 to Section 3, *ante*.

Article 164

<p>164.* By a defendant, for an order to set aside a decree passed <i>ex parte</i>.</p>	<p>Thirty days.</p>	<p>The date of the decree, or where the summons was not duly served, when the applicant has knowledge of the decree.</p>
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Ex parte decree under the Provincial Small Cause Courts Act, 1887.
4. "Defendant," if includes his legal representative.
5. Starting point.
6. "Summons," meaning of.

*	Act of 1877	
164.—By a defendant for an order to set aside a judgment <i>ex parte</i> .	Thirty days.	The date of executing any process for enforcing the judgment.
	Act of 1871, Article 157	
	Same as in the Act of 1877.	
	Act of 1859	
	No corresponding provision.	

Note 12

1. (1931) A I R 1931 Cal 319 (320) 129 Ind Cas 778, *Madha Ram v. Mt. Tuppo Rubhani*.
 - (1936) A I R 1936 Lah 495 (496) : 163 Ind Cas 274, *Mt. Karam Behari v. Jagannath*.
 - (1925) A I R 1925 Lah 321 (321) : 86 Ind Cas 256, *Firm Dunichand Gokatchand v. Pritam Das*.
 - (1920) A I R 1920 Lah 346 (347) : 55 Ind Cas 55, *Bano Mal v. Bano Mal*.
 - (1926) A I R 1926 Mad 980 (983) : 50 Mad 67 : 97 Ind Cas 1008, *Narayana Chettiar v. Muthu Chettiar*.
 - (1933) A I R 1933 Mad 259 (259) : 143 Ind Cas 240, *Sundaresa v. Subba Rao*.
 - (1928) A I R 1928 Nag 91 (92) : 23 Nag L R 183 : 107 Ind Cas 193, *Saba v. Dayaram*.
 - (1935) A I R 1935 Rang 406 (471) : 13 Rang 595 : 150 Ind Cas 915, *K. P. L. S. S. Chettiar v. Official Receiver, Ramnad*.
 - (1924) A I R 1924 Rang 274 (275) : 82 Ind Cas 418, *S. G. M. Samson v. Sultanam*.
- [See also (1925) A I R 1925 Oudh 105 (106) : 80 Ind Cas 75, *Shamshad Mehdi v. Mahbub Khan*, (Suit dismissed against two defendants, restored as against one defendant on plaintiff's application — Court on its own initiative restoring suit against the other defendant beyond limitation — Held, order was *ultra vires*)]

7. Service of summons referred to is service on the original defendant.
8. "Knowledge of the decree."
9. Extension of time.
10. Exclusion of time under Section 14.
11. Section 18 and this Article.
12. Section 22 and this Article.
13. Parties to application.
14. Onus of proof.
15. Subsequent application.

Article 164
Notes
1—2

Other Topics

Application to set aside <i>ex parte</i> decree not to be altered to one for review to avoid limitation	See Note 9, F-N (1)
Article applies only to application but not to suit to set aside <i>ex parte</i> decree	See Note 2, Pts 7a, 8
"Decree" limited to decree passed in <i>suit</i>	See Note 2
Defendant must apply	See Note 2, Pt. 9
Defendant must have right to apply	See Note 2
Due service—What is	See Note 5 and F-Ns (3) to (6)
Substituted service — If due service	See Note 5, Pts. 6 to 8 and F-N (4)
Summons duly served—Applicant's knowledge is immaterial	See Note 5, Pt. 2

1. Legislative changes.—There was no provision corresponding to this in the Act of 1859. Section 119 of the Code of Civil Procedure, 1859, however, provided that an application to set aside an *ex parte* decree should be made within 30 days "after any process for enforcing the judgment has been executed" against the defendant.

The provision as to limitation in Section 119 of the Code of 1859 was enacted as Article 157 in the Act of 1871, the 30 days' period being made to run as before from the date of executing any process for enforcing the judgment.

The Article was re-enacted without any change in the Act of 1877.

In the present Act, the word "judgment" which occurred in the corresponding provisions of the previous Acts has been substituted by the word "decree." The third column has been materially altered.

2. Scope of the Article.—In order that this Article may apply

- 1 There must be an *ex parte* decree against a *defendant*
- 2 Such defendant must have a *right to apply* to have such decree set aside.
- 3 There must be an *application* by the defendant made for that purpose

1. *Ex parte* decree against a defendant — The word "decree" interpreted in the light of the words "where the *summons* was not duly served" in the third column of the Article seems to be limited to a decree passed in a *suit*. This is also made clear by the fact that

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Note 2

an application by a *respondent* to set aside an *appellate decree* passed *ex parte* is separately provided for by Article 169 *infra*, under which time runs from the date of the decree in appeal or where notice of the appeal is not duly served, when the applicant has knowledge of the decree. An order having the force of a decree in a proceeding which is not a suit would therefore not be a "decree" within the meaning of this Article. Thus, an application to set aside an *ex parte* order in execution which has the force of a decree under Section 47 of the Civil Procedure Code is not governed by this Article. This is borne out by the enactment in Madras of Rule 15 of Order 9 of the Civil Procedure Code providing a period of limitation for such applications.

It does not, however, seem necessary that the *suit* and the *decree* should be under the *Civil Procedure Code*. Where under any enactment, as for example Section 295 of the Succession Act, a particular proceeding is to take the form of a suit and the order passed is to be enforced as a decree, an application to set aside such a decree passed *ex parte* will be governed by this Article.¹

It would follow from the above discussion that an application to set aside an order which does not amount to a *decree* at all in any sense cannot be governed by this Article. Thus, an application to set aside an *ex parte* order under Section 152 of the Civil Procedure Code,² or under Section 150 of the Companies Act 1882,³ or under Order 21 Rule 50 sub-rule 2 of the Code of Civil Procedure,^{3a} is not within this Article. A contrary view has, however, been expressed in some cases. The High Court of Lahore has held in the undermentioned case⁴ that an application to set aside an *ex parte* order of adjudication of an insolvent must be made within the period prescribed by this Article. According to the Sind Judicial Commissioner's Court, the Article is not necessarily restricted to applications to set aside decrees passed in suits, but applies to applications under Order 9 Rule 13 read with Section 141 of the Code of Civil Procedure, for example, to applications for filing an award under the Arbitration Act.⁵ This view was rested on the decision of the Madras High Court in *Subbiah Naicker v. Ramanathan Chettiar*.⁶ *Subbiah Naicker's case*⁶ has, however, now been overruled by a Full Bench decision of

Article 164 — Note 2

1. See (1915) A I R 1915 Cal 85 (86) : 24 Ind Cas 27 : 41 Cal 810, *Abhoyacharan v. Saroja Sundari*.
2. (1933) A I R 1933 Rang 264 (265) : 145 Ind Cas 823, *W. H. Lawrence v. Duran Singh*.
- 3 (1920) A I R 1920 Lah 51 (53) : 1 Lah 187 : 55 Ind Cas 820, *Hindustan Bank Ltd v. Meharaj Din*.
- 3a (1929) A I R 1929 Bom 386 (388) : 53 Bom 839 : 120 Ind Cas 833, *Kanji Shirji v. Yashraj Shirji & Co*.
4. (1932) A I R 1932 Lah 522 (523) : 133 Ind Cas 377, *Umar Din v. Laghu Nath Sahu*.
- 5 (1924) A I R 1924 Sind 56 (56) : 75 Ind Cas 1033, *Fleming Shaw & Co. v. Mangalchand Dwarkadas*.
- 6 (1914) A I R 1914 Mad 162 (169) : 37 Mad 462 : 22 Ind Cas 899.

the same Court,⁷ and is no longer law. It is submitted that the decisions of the Lahore and Sind Courts referred to above are not correct on principle.

2. *Defendant must have a right to apply* — Unless there is a right to apply to set aside the *ex parte* decree, it is clear that no application will lie at all and consequently there is no room for the applicability of this Article. In the case of decrees passed in *suits*, Order 9 Rule 13 gives a right to the *ex parte* defendants to apply to set aside such decrees under certain circumstances. In the case of other proceedings, if Section 141 of the Code of Civil Procedure applies to such proceedings, Order 9 Rule 13 may apply to orders passed therein which may amount to decrees. But, as has been seen already, the "decree" contemplated by this Article is a decree in a *suit* and not in any other proceeding, and in that view this Article would be inapplicable.

3. *Defendant must apply.*—The Article applies only to an *application* to set aside the *ex parte* decree.^{7a} It does not apply to a *suit* to set aside such decree on the ground of fraud.⁸ Further, such application must be made by a *defendant*. An application, for example, for revocation of a probate of a will by a person who was not cited in the probate proceedings (which is to be in the form of a suit under Section 295 of the Succession Act) and therefore was not a "defendant" in such proceedings, is not governed by this Article.⁹

It has been held by the High Court of Calcutta that the provisions of Order 9 Rule 13 of the Civil Procedure Code do not in terms apply to proceedings on the Original Side of the High Court and that consequently an application to set aside a decree filed on the Original Side of the High Court is not governed by this Article.¹⁰

3. *Ex parte decree under the Provincial Small Cause Courts Act, 1887.*—Before the amendment of Section 17 of the Provincial Small Cause Courts Act in the year 1935, there was a conflict of opinion on the question whether the deposit or security required to be made or given by that Section should accompany the application or may be made or given within the period prescribed by this Article or whether the Court could grant time for that purpose even beyond the 30 days prescribed by this Article.¹ The amendment of the

7. (1931) A I R 1931 Mad 656 (658) 61 Mad L Jour 348 (353) 55 Mad 17 134 Ind Cas 806 (F B), *Arunachallam v. Veerappa Chettiar* (A I R 1914 Mad 162, A I R 1926 Mad 412, A I R 1929 Mad 757, Considered)

7a (1935) A I R 1935 Cal 95 (96) 154 Ind Cas 414, *Abbasali v. Ram Kanai* (1918) A I R 1918 Mad 545 (547) 42 Ind Cas 421, *Sundaram Reddy v. Pattabhirams Reddy*

8 (1896) 26 Cal 326n (332n) 3 Cal W N 395, *Motilal Chuckerbutty v. Russel, Chandra Baiyaji*

9. (1915) A I R 1915 Cal 85 (86) . 41 Cal 819 24 Ind Cas 27, *Abhaya Charan v. Saroja Sundari*

10 (1928) A I R 1928 Cal 864 (865) 116 Ind Cas 633, *Ramjan Ali Haji v. Haji Abdul Gaffur*. (A I R 1928 Cal 772, Followed)

Note 3

1 For a full discussion of the conflicting views, see (1931) A I R 1931 Lab 332 (335) 131 Ind Cas 635 12 Lab 359 (F B), *Gedi Mal v. Huna Mal*.

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Notes
3—4

Section in 1935 has now set the conflict at rest and unless the deposit or the security, as the case may be, accompanies the application, there is no valid application on which the Court can act.² The Court cannot now extend the time for making such deposit or for giving such security.³

4. "Defendant," if includes his legal representative.—The word "defendant" in this Article would also include his legal representative so that an application by the legal representative of a defendant against whom an *ex parte* decree has been passed to set aside such decree, would be governed by this Article.^{1a} Thus, it has been held by the High Court of Madras that the word "defendant" in this Article is wide enough to include the executor of the original defendant against whom an *ex parte* decree has been passed and that he can apply to set aside the decree within the time allowed by this Article, whether he has been made a party to the suit or not, or whether he has been brought on record or not at the time when the application is made.¹ It has also been held in cases arising under Order 9 Rule 13 of the Civil Procedure Code, that the word "defendant" in that Rule would include his legal representative and that such legal representative can apply to have the decree set aside under that Rule.²

[See also (1933) A I R 1933 All 933 (934) : 147 Ind Cas 853, *Ahmad Yar Khan v. Kheyali*. (Application to set aside *ex parte* decree—Security bond filed in time but verified late—Validity of.)

(1922) A I R 1922 Mad 830 (832) : 70 Ind Cas 496, *BalaKrishna Aiyar v. Pitchamuthu Pillai*. (Security must be given within 30 days)

(1930) A I R 1930 All 830 (831) : 53 All 59 : 123 Ind Cas 765, *Moti Lal Ramchandrar v. Durga Prasad*.

(1931) A I R 1931 All 727 (733) : 54 All 154 : 136 Ind Cas 600 (FB), *Ram Bharose v. Ganga Singh*

(1928) A I R 1928 All 607 (608) : 51 All 402 : 111 Ind Cas 719, *Kiran Koomar v. Baij Nath*.

(1930) A I R 1930 Oudh 1 (2) : 122 Ind Cas 328 : 5 Luck 294, *Narain v. Pudan*.]

2. (1938) A I R 1938 Lah 18 (19) : I L R (1937) Lah 728 . 173 Ind Cas 952, *Mohammad Ramzan Khan v. Khubi Khan*.

[But see (1936) A I R 1936 Pesh 193 (194) : 167 Ind Cas 479, *Jugal Kishore v. Abdul Hinan*. (The amendment was not adverted to in this case.)]

3 (1938) A I R 1938 Lah 18 (19) - I L R (1937) Lah 728 . 173 Ind Cas 952, *Muhammad Ramzan Khan v. Khubi Khan*.

[But see (1937) A I R 1937 Oudh 206 (207) : 166 Ind Cas 187, *Din Muhammad v. Darbari Lal*. (The amendment of S. 17 in 1935 was not adverted to in this case)]

(1936) A I R 1936 Oudh 407 (409) : 161 Ind Cas 470 . 12 Luck 297, *Mahabir v. Sheo Saran*. (Do)]

Note 4

1a (1925) A I R 1925 Oudh 370 (371) : 27 Oudh Cas 299 : 85 Ind Cas 529, *Mt. Deoki v. Jugal Kishore*.

(1915) A I R 1915 Mad 1204 (1205) 21 Ind Cas 568 : 38 Mad 412, *Venkata-subbier v. Krishnamurthy*.

1. (1915) A I R 1915 Mad 1204 (1205) . 21 Ind Cas 568 . 38 Mad 412, *Venkata-subbier v. Krishnamurthy*. (29 Cal 33 Followed)

2. (1902) 29 Cal 57 (36), *Ganoda Prasad Roy v. Shib Naram Mukerjee*.

In *Doraisamy Iyer v. Balasundaram Iyer*,³ it has been held that Section 146 of the Civil Procedure Code refers only to taking proceedings or making applications and not to *continuing* proceedings or applications already started, and that therefore, the legal representative of a defendant who has died after making an application to set aside an *ex parte* decree against him, cannot continue such application. It has also been held in the same case that even assuming that Section 146 of the Civil Procedure Code applies to the case, the applicant cannot continue the proceedings inasmuch as there was no possibility of proving that the defendant had knowledge of the decree within the thirty days prescribed by this Article.

5. Starting point.—Under the provisions in the previous Acts corresponding to this Article, time for an application to set aside an *ex parte* decree ran from the date of *executing any process for enforcing the judgment*.^{1a}

Under the present Article, time runs *from the date of the decree, or where the summons was not duly served, from the date when the*

(1923) A I R 1923 All 90 (30) 83 Ind Cas 601, *Mt Banoo v Hardwar Lal*.
(1907) 23 All 574 (575) 1907 All W N 176 4 All L Jour 480, *Beti Jee v. Sham Bihari Lal*

See also Note 16 to O 9 R. 13 of the Authors' Commentaries on the Civil Procedure Code

3. (1927) A I R 1927 Mad 507 (508) : 102 Ind Cas 243.

Note 5

1a (1867) 7 Suth W R 198 (198), *Radha Benode Chowdhry v. Modhoo Soodun Sircar* (Section 119 of the Code of 1859).

(1866) 6 Suth W R 51 (51), *Shib Chundar Bhadure v. Lackee Debia Choudhrai* (Do)

(1867) 7 Suth W R 375 (375), *Shashk Gholam Ahyah v Sham Soondur Koonwaree* (Do)

(1868) 9 Suth W R 236 (239) Beng L R Sup Vol 947 (FB), *Radha Bindoo Choudhry v. Digumburee Dossee* (Do).

(1870) 13 Suth W R 436 (437), *Shumboo Chunder Holdar v. Ram Lal Ghose*

(1871) 15 Suth W R 210 (211), *Sookh Moyee Dossee v. Nurmooda Dossee*.

(1876) 25 Suth W R 72 (79), *Kaly Prasad v. Digambur Chatterjee*

(1869) 1869 Pun Re No. 3, *Mt Googree v. Ruttun Chand Puree*

(1878) 1878 Pun Re No. 32, *Chowdri Hual v. Jas Kishen*.

(1876) 2 Cal 123 (124), *Poorno Chunder Coondoo v. Prowanno Coomar Sikdar*. (Act of 1871)

(1906) 1906 Upp Bur Rul 2nd Qr Lim. 7, *Nga Tha Din Mi Tin v. Nga Po Chan* (Act of 1877)

(1910) 6 Ind Cas 400 (400) 34 Mad 88, *Suryanarayana v. Ramanna* (Do)

(1897) 1897 Pun Re No. 5, *Ishra Singh v. Jhanda* (Do)

(1905) 1905 Pun L R No. 110, *Guranditta v. Ziyada* (A notice served under S. 243 is an execution of a process for enforcing judgment)

(1883) 9 Cal 869 (870), *Bhobunessury v. Judobendra Narain Mullik* (Do.)

(1884) 1884 All W N 322 (322), *Pachu v. Jas Kishen* (Do)

(1885) 7 All 345 (353) 1885 All W N 73, *Har Prasad v. Jafar Ali*. (Do)

(1884) 6 All 144 (147) 1884 All W N 1, *Sunraj Kuari v. Anbala Prasad Singh* (Do)

(1898) 20 All 311 (314) 1898 All W N 45, *Mulamad Khan v. Hanuman Singh* (Do)

(1888) 1888 Bom P J 56 (56), *Eatje v. Ramji*. (Do)

(1907) 31 Bom 303 (307) 9 Bom L R 323, *Hanuman v. Shastar* (Do)

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Note 5

applicant has *knowledge of the decree*. It must be noted that time will run from the date of knowledge *only where the summons is not duly served*.¹ Where the summons is duly served, the date of the applicant's knowledge of the decree is immaterial and time will run from the date of the decree.²

The second part of this Article comes into operation only where the application is made more than thirty days after the passing of the decree, and the applicant pleads that he had not been duly served and had knowledge of the decree only within thirty days from the day on which he made the application.³ The question therefore arises as to when a summons may be said to be *duly served* in law. Order 5 of the Civil Procedure Code prescribes the various modes in which a service may be effected. If the service is effected in the prescribed mode, it is clear that there has been a "due service." The applicant may show that as a matter of fact there was no due service, i.e., service in the manner prescribed by law.⁴ But if he does not show this and *prima facie* the record shows that the prescribed procedure

(1906) 8 Bom L R 567 (569), *Sidharthari v. Anantram*. (Do.)

(1912) 17 Ind Cas 420 (420) · 15 Oudh Cas 289, *Rajab Ali Shah v. Upper India Paper Mills Co. Ltd.* (Attachment of debt due to judgment-debtor is an execution of a process for enforcing judgment.)

(1910) 8 Ind Cas 663 (666) (Mad), *Chidambara Thevan v. Arunachalla Thevan*. (Do.)

1 (1923) A I R 1923 Nag 13 (14) · 69 Ind Cas 549, *Panjab Rao v. Daliram*
(1928) 108 Ind Cas 753 (754) (Mad), *Subramania Iyer v. Krishnasamy Naidu*.

(1926) A I R 1926 Mad 558 (559) : 94 Ind Cas 420, *Doraisamy Aiyar v. Balasundaram Aiyar*.

(1912) 13 Ind Cas 642 (642) (Mad), *Sanka Iyer v. Subbiah Iyer*.

(1926) A I R 1926 Cal 327 (329) : 91 Ind Cas 965, *Baldevdas Lohia v. Shubcharandas Goenka*.

2 (1925) A I R 1925 Bom 444 (445) : 89 Ind Cas 223, *Ghanshiram Baluram v. Misrilal Chunilal*.

(1932) A I R 1932 Oudh 326 (327) : 141 Ind Cas 759, *Har Charan Seth v. Muhammad Asizullah*.

(1916) A I R 1916 Cal 651 (652) · 29 Ind Cas 476, *Tara Sanhar Ghose v. Nasaruddin*.

3. (1930) A I R 1930 Lah 397 (399) : 129 Ind Cas 689, *Mir Ahmed v. Pir Baksh* (Party who is cognizant of proceedings against him is duly served when after failure to effect personal service, proclamation is published in newspapers.)

has been followed, the defendant cannot claim any extension of the period of thirty days from the date of the decree on the ground that, really he had no knowledge of the decree.⁵ The above principles will apply to service of summons in *any* of the modes prescribed by Order 5 of the Code and will therefore apply also to the case of substituted service prescribed by Order 5 Rule 20 of the Code. The general trend of opinion accordingly is that substituted service is "due service" unless it is shown that the procedure prescribed for effecting such service has not been followed, and that time in such cases will run from the date of the decree and not from the date when the applicant has knowledge of the decree.⁶

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Note 5

- (1934) A I R 1934 Cal 745 (746) 152 Ind Cas 830, Kedar Mull v. Wazifunissa
- (1938) A I R 1938 Oudh 11 (12) . 171 Ind Cas 617, Gajadhar v Uma Datt.
- (1931) A I R 1931 All 727 (729) 54 All 154 136 Ind Cas 609 (FB), Ram Bharose v. Ganga Singh.
- (1918) 19 Ind Cas 425 (426) 9 Nag L R 35, Habibullah v Karanju
See also cases cited in Foot-Notes (5, 6), below
5. (1928) 109 Ind Cas 753 (754) (Mad), Subramaniya Iyer v Krishnaswami Naidu
[See also (1914) A I R 1914 Sind 109 (110) 27 Ind Cas 351 8 Sind
- dant to appear and answer on the day fixed in the summons)
- (1917) A I R 1917 Sind 27 (29) 42 Ind Cas 611 . 11 Sind L R 71, Kesarchand v Lakhamji. ("Duly served" means served in such a way as to give the defendant information of the proceedings, i e duly served within the meaning of the term as used in O S R 19))
- 6 (1927) A I R 1927 Mad 487 (488) 101 Ind Cas 651, Narasimha Chettiar v. Balakrishna Chetty
- (1927) A I R 1927 Mad 507 (508) 102 Ind Cas 243, Doraiswamy Iyer v. Balasundaram Iyer
- (1928) A I R 1928 Mad 815 (816) 51 Mad 800 110 Ind Cas 490, Shariba Beeby v. Abdul Salam.
- (1930) A I R 1930 Mad 222 (224) 122 Ind Cas 35, Krishna Padayachi v. Vinayaka Swamiyar (In the case of substituted service, the Article lays down that when the order is rightly made and the service directed by the order is properly effected, knowledge of the defendant is immaterial and time runs from the date of the decree Where however, an order for substituted service is improperly obtained, as being made on insufficient material contained in an application supported by affidavit, the summons cannot be said to have been duly served within the meaning of Art 164, and the time accordingly runs not from the date of the decree but from the date when it first came to the knowledge of the defendant)
- (1931) A I R 1931 Mad 812 (813) 55 Mad 240 135 Ind Cas 344, Muhaimin Kader Veera Sahib v Lakshumanan Chettiar (There may be circumstances under which there is no difficulty in treating substituted service as due service If defendant deliberately evades service and substituted service is properly asked for, granted and effected, there is due service)
- (1932) A I R 1932 Mad 472 (473) 133 Ind Cas 146, Rajagopalachari v Subramaniam
- (1931) A I R 1931 All 727 (729) 54 All 154 136 Ind Cas 609 (FB), Rama Bharose v Ganga Singh
- (1918) 19 Ind Cas 425 (426) 9 Nag L R 35, Habibullah v Karanju.

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In *Venkatachalam v. Subbaya*,⁷ it was however held by Mr. Justice Srinivasa Iyengar that a substituted service can never be "due service" within the meaning of this Article and that consequently time will run only from the date when the applicant got knowledge of the decree. This view has not been followed in other cases⁸ of the Madras High Court and cannot be considered to be correct. In *Gyanammal v. Abdul Hussain*,⁹ Mr. Justice Reilly was of the opinion that even though substituted service is technically and formally effected in the manner prescribed by the Code, it is not due service unless it has been really effective, i. e., has achieved the object of service by bringing the claim against him to the *knowledge of the defendant*, or respondent. It is submitted that this view also does not appear to be correct. Where a mode of service prescribed by the Code is followed in the manner prescribed in all details, it cannot be said that there has, nevertheless, been no due service.

6. "Summons," meaning of.—The word "summons" in this Article refers to summons to be served on the defendant for the first hearing of the suit. It does not include notices that might be served on the defendant during subsequent stages of the suit. Therefore, where the summons for the first hearing has been duly served on the defendant and the fact that the case was transferred to another Court and notice of such transfer was not duly served on the defendant,¹ or the fact that the suit was adjourned to another date and notice of such date was not given to the defendant,² or the fact that the suit was remanded by the Appellate Court for re-hearing and no notice of the date of hearing on remand was duly served on the defendant,³ will not give a fresh starting point of limitation under this Article.

7. Service of summons referred to is service on the original defendant.—The party with reference to whom service of summons is spoken of in this Article is the *original defendant*. Where a legal

(1925) A I R 1925 Lah 639 (639) : 92 Ind Cas 272, *Dillu Ram v. Nawab*.

(1931) A I R 1931 Lah 118 (118) : 131 Ind Cas 344, *Hansraj v. Narain Singh*.

(1931) A I R 1931 Oudh 369 (369) : 132 Ind Cas 778, *Thakur Prasad v. Barats Lal*.

[See also (1935) A I R 1935 Pesh 112 (113) : 157 Ind Cas 878, *Dharam Chand v. Dharam Chand*

(1925) A I R 1925 Rang 187 (188) : 2 Rang 655 : 85 Ind Cas 324, *Ma Naw Naw v. Somasundaram Chetty*]

7. (1928) A I R 1923 Mad 655 (655) : 103 Ind Cas 890.

8. See the Madras cases cited in Foot-Note 6 above.

9. (1931) A I R 1931 Mad 813 (816) : 55 Mad 223 : 131 Ind Cas 1202.

Note 6

1. (1932) A I R 1932 Lah 539 (540) : 139 Ind Cas 351, *Sham Sundar Khushi Ram v. Devi Ditta Mal*.

2. (1920) A I R 1920 Lah 261 (262) : 57 Ind Cas 15, *Mt Lal Devi v. Amar Nath*

(1924) A I R 1924 Lah 666 (666) : 76 Ind Cas 14, *Surjit Singh v. C. J. Torrie*.

3 (1935) A I R 1935 Pat 7 (-) : 151 Ind Cas 429, *Tara Chand v. Ram Chand*.

representative of a deceased defendant against whom an *ex parte* decree had been passed, applied to set aside such decree and it was found that the original defendant had been duly served, it was held that time ran from the date of the decree and not from the date when the legal representative got knowledge of the decree.¹

8. "Knowledge of the decree."—The term "knowledge" means a certain and clear perception of a fact. The expression "knowledge of the decree" in the Article means knowledge not of a decree, but of the particular decree which is sought to be set aside.¹ It does not, however, mean knowledge of the contents of the decree or the general effect thereof.^{1a}

In *Bapu Rao Sakharani v. Sadhu Bhivba*,² Macleod, C. J., observed as follows :

"We think the words of the Article mean something more than mere knowledge that a decree had been passed in some suit in some Court against the applicant. We think it means that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed against him in a particular Court in favour of a particular person for a particular sum."

The same view has been held in the undermentioned cases also.³ A vague suspicion that the defendant must have heard of some decree is not enough to dismiss his petition on the ground that it is barred by limitation.⁴ Knowledge of the *suit* is not knowledge of the decree.^{4a} A party praying to set aside an *ex parte* decree cannot be held to have had knowledge of a decree that had been passed against him from the mere fact that he had been told some information in a suit of which he is given no details. The fact that such information might have put the defendant on inquiry does not impose on him a

Note 7

- 1 (1915) A I R 1915 Mad 1204 (1205) · 38 Mad 442 21 Ind Cas 568, Venkatasubbier v. Krishnamurthi

Note 8

1. (1909) 4 Ind Cas 586 (587, 588) (Bom), Pundlich Rouji v. Vasantrao Madhavrao.
 (1911) 9 Ind Cas 189 (193) 38 Cal 394, Kismud Nath v. Jatindra Nath.
 1a (1910) 6 Ind Cas 901 (903) (Bom), Abdool Hoossein v. Esmailji.
 2 (1923) A I R 1923 Bom 193 (193) 47 Bom 485 72 Ind Cas 130.
 3 (1926) 92 Ind Cas 295 (296) (Nag), Isram v. Gangia.
 (1926) A I R 1926 Mad 31 (33) 90 Ind Cas 1042, Mahomed Sahib v. Alagappa Chettiar.
 (1937) A I R 1937 Pat 17 (19, 20) 166 Ind Cas 635, Kedar Nath Singh v. Kesri Mull.
 (1931) A I R 1931 Nag 119 (120) 27 Nag L R 53 134 Ind Cas 279, Chintaman v. Pannalal.
 4 (1926) A I R 1926 Mad 31 (33) 90 Ind Cas 1042, Mahomed Sahib v. Alagappa Chettiar.
 (1937) A I R 1937 Pat 17 (19, 20) 166 Ind Cas 635, Kedar Nath Singh v. Kesri Mull.
 4a (1930) A I R 1930 Lah 277 (295) 129 Ind Cas 189, Mir Ali et al v. Pir Bakhsh.

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particular obligation to inquire further. The duty is rather on the plaintiff of giving full information as to the litigation and knowledge of the decree.⁵ Where the petitioner's brothers had knowledge of the *ex parte* decree made against the petitioner, the inference cannot reasonably be drawn that the petitioner had knowledge of it, when it is proved that he lived away from his brothers and there is no evidence that they communicated the fact of the decree to him.⁶

The question when the applicant has knowledge of the decree is one of fact.⁷ Before holding that the application for setting aside the decree is barred by limitation, the Court is bound to make an inquiry as to when the defendant got knowledge of the decree.⁸

The knowledge of the decree referred to in the Article is that of the *applicant*. If the legal representative of a deceased defendant, against whom an *ex parte* decree has been passed, wishes to file an application to set it aside, on the ground that the summons was not duly served on the defendant, he should do so within 30 days of his (i. e. the applicant's) knowledge of the decree.⁹ But if the defendant himself has made such an application and on his death the legal representative continues the application, the date of knowledge of the legal representative is immaterial and it must be shown that the application by the defendant was made within 30 days of *defendant's* knowledge.¹⁰

9. Extension of time. — It is a general principle that the Court cannot under its inherent power extend the period of limitation prescribed by the Act.¹ It follows that the Court cannot override

(1933) A I R 1933 Pat 279 (280) : 12 Pat 745 : 145 Ind Cas 314, *Rajeshwari Prasad Singh v. Brahmanand Lal*. (Under Article 164 an application to set aside an *ex parte* decree must be filed within thirty days from the date of the applicant's knowledge of the decree and not within thirty days of his knowledge of the suit.)

5 (1927) A I R 1927 Mad 381 (381, 382) : 99 Ind Cas 621, *Palaniappa Chettiar v. Vedachalla Mudaliar*.

6. (1911) 9 Ind Cas 189 (193) : 38 Cal 394, *Kumud Nath v. Jalindra Nath*.

7. (1889) 12 Mad 512 (516) : 5 Sar 455 : 13 Ind Jur 409 (P C), *Krishnan v. Sridevi*.

(1937) A I R 1937 Pat 17 (19, 20) : 166 Ind Cas 635, *Kedar Nath v. Kesri Mull*.

8. (1934) A I R 1934 All 1011 (1013) : 151 Ind Cas 579, *Ajodhya Pershad v. Sari Ram*.

[See also (1929) A I R 1929 Lah 235 (236) : 116 Ind Cas 620, *Charan Das v. Purn Lal Gobind Pershad*. (It is necessary for the

9. (1925) A I R 1925 Oudh 370 (371) : 85 Ind Cas 529 : 27 Oudh Cas 299, *Mt. Deoki v. Jugal Kishore*.

10. See (1927) A I R 1927 Mad 507 (508) : 102 Ind Cas 213, *Doraiswamy Iyer v. Balasundaram Iyer*.

Note 9

1. See Note 3 to Section 3, *ante*

(1924) A I R 1924 Lah 666 (666) : 76 Ind Cas 14, *Surjit Singh v. C. J. Torrie*.

under its inherent powers the period prescribed by this Article on any equitable grounds.²

Section 5 of the Act does not expressly refer to an application under this Article and therefore, unless it has been made applicable to such applications by or under any other enactment, it cannot be resorted to for the purpose of excusing the delay in filing the application.³ In the Provinces of Bombay and Madras and the Central Provinces, Sec 5 has, however, been made applicable to applications under Order 9 Rule 13 of the Civil Procedure Code, and in those Provinces the Court can, for sufficient cause, excuse the delay in filing the application.⁴

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[See also (1920) A I R 1920 Lah 261 (261) 57 Ind Cas 15, *Mt Lal Dei v. Amar Nath*. (Application to set aside an *ex parte* decree cannot be altered to one for review, by merely changing the description, to avoid limitation)]

2. (1935) A I R 1935 Pesh 146 (147), *Ajab Khan v Alaf Gul*
 (1910) 6 Ind Cas 901 (902) (Bom), *Abdool Hussain Esufally v. Esmaily, Abdool Hossain*
 (1928) A I R 1928 Rang 273 (275) 113 Ind Cas 811 6 Rang 494, *U E Maung v P A R P Chettiar Firm*
 (1934) A I R 1934 Nag 43 (44) 144 Ind Cas 394, *Pundalik Vithoba v Ganpat*
 (1920) A I R 1920 Lah 261 (262) 57 Ind Cas 15, *Mt Lal Dei v Amar Nath*
 (1922) A I R 1922 Pat 479 (480) 65 Ind Cas 341 . 1 Pat 277, *Ajodhya Mahon v. Phul Kuer*.
 (1926) A I R 1926 Lah 135 (135) 69 Ind Cas 427, *Firm Kundan Lal Mukandi Lal v. Kanshi Ram*
 (1922) A I R 1922 Lah 266 (266) 66 Ind Cas 270, *Khaurati v Umar Din*
 (1927) A I R 1927 Lah 342 (343) 100 I C 936, *Pal Singh v Harnam Singh*
 (1936) A I R 1936 Rang 305 (305) 164 Ind Cas 286, *Jagadamma Pandit v Naresh Pandey*.
- 3 (1916) A I R 1916 Cal 651 (652) 29 Ind Cas 476, *Tara Sanhar Ghose v. Nasaruddin*
 (1925) A I R 1925 Oudh 446 (446) 89 Ind Cas 482, *Mt Sitaba v Mata Din*.
 (1925) A I R 1925 Rang 187 (188) 2 Rang 655 85 Ind Cas 324, *Ma Nau Nae v Somasundaram Chetty*
 (1933) A I R 1933 Rang 110 (111) . 144 Ind Cas 980, *Ramanathan Chettiar v Baldeo Singh*
 (1927) A I R 1927 Lah 342 (343) 100 Ind Cas 936, *Pal Singh v Harnam Singh*
 (1920) A I R 1920 Lah 261 (262) 57 Ind Cas 15, *Mt Lal Dei v Amar Nath*
 (1922) A I R 1922 Lah 266 (266) 66 Ind Cas 270, *Khaurati v Umar Din*
 (1910) 6 Ind Cas 901 (902) (Bom), *Abdool Hossain Esufally v Esmaily, Abdool Hussain* (Section 5 has now been made applicable to such

4. (1925) A I R 1925 Mad 14 (17) 47 Mad 824 80 Ind Cas 877 (F B), *Krishnamachariar v. Sri Rangammal*.
 (1917) A I R 1917 Mad 957 (957) 32 Ind Cas 975 *Sennimalas Goundan v. Palani Goundan*.
 (1922) A I R 1922 Mad 186 (187) 45 Mad 628 66 Ind Cas 101, *Sudalamuthu Kudumban v. Andu Raddiar*

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Section 6 of the Act is limited in its applicability to suits and applications for execution and, consequently, cannot be taken advantage of for making an application governed by this Article.⁵

10. Exclusion of time under Section 14. — In computing the period of limitation prescribed by this Article, the time during which the applicant has been prosecuting another civil proceeding in a wrong Court may be excluded under the provisions of Section 14 *ante*, if the conditions of that Section are satisfied.¹

11. Section 18 and this Article. — Section 18 can be availed of by an applicant to set aside an *ex parte* decree, where he has been kept by fraud from the knowledge of his right to apply. See Notes to Section 18 *ante*. But the fraud must be such as to have kept him from knowledge of his right to apply and not such as has prevented him from exercising his right. Where the petitioner alleged that he went to the decree-holder and asked him about the decree and the latter said that he would come and settle things with him, it was held that the fraud alleged was not of the nature contemplated by Section 18 and that it did not affect limitation.² The fact that an *ex parte* decree has been obtained by fraud is not a ground for postponing the period of limitation under Section 18.³ Where the holder of a preliminary decree represented to the judgment-debtor that he should not and need not appear in the final decree proceedings on the assurance that such proceedings would be dropped, but nevertheless, continued the proceedings and obtained a final decree, it was held that fraud such as is contemplated by Section 18 was practised on the judgment-debtor and that Section 18 could be availed of by him in an application to set aside the *ex parte* decree.³

12. Section 22 and this Article. — See Note 3 to Section 22, *ante*.

13. Parties to application. — There is no provision in the Civil Procedure Code requiring that persons in whose favour an *ex parte* decree has been passed should be named in the application to set aside such decree. If the application is made in time, the fact that

5. (1910) 8 Ind Cas 543 (544) : 35 Mad 678, *Chidambaram Chetty v. Karuppan Chetty*

(1917) A I R 1917 Lah 144 (146) : 37 Ind Cas 292 : 1916 Pun Re No. 101, *Manohar Lal v. Mt. Sadiqa Begam*.

Note 10

1. (1932) A I R 1932 All 340 (342) : 51 All 423 : 140 Ind Cas 178, *Raghunandan Chaube v. Dhruval Tewari*. (A I R 1923 All 919 held not correctly decided.)

(1910) 6 Ind Cas 154 (156) (Cal), *Basuruddin Mondal v. Sonaulah Mondal*.
 (1920) A I R 1920 Bom 351 (352) : 57 Ind Cas 551, *Ibrahim Harun v. Jusaf Hussain*.

Note 11

1. (1933) A I R 1933 Rang 110 (111) : 144 Ind Cas 920, *Ramanathan Chettyar v. Baldeo Singh*.

2. (1920) A I R 1920 Lah 261 (261) : 57 Ind Cas 15, *Mt. Lal Devi v. Amar Nath*.

3. (1926) A I R 1926 Nag 353 (353) : 94 Ind Cas 56, *M. D. Kinkhede v. Mohanya*.

the person in whose favour the decree was passed was not named in it at the time, but later, does not affect limitation.¹

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14. Onus of proof. — When an application for setting aside an *ex parte* decree is made more than 30 days from the date of the decree and the applicant alleges that he was not duly served, the onus is on him to show that he did not have knowledge of the decree more than 30 days before the application was made.¹ It lies all the more heavily upon him when it is found that he was perfectly well aware of the progress of the suit.² The onus cannot be shifted by the bare denial of knowledge made by the defendant.³

15. Subsequent application. — Where an application to set aside an *ex parte* decree is made in time, but owing to the impossibility of serving the opposite side with notice the Court consigned the application to the record room, and subsequently the judgment-debtor renewed his application to set aside the decree, but beyond time, it was held by the Lahore High Court that the original application must be deemed to be pending, that the subsequent application must be considered as merely one in continuance of the suspended original application and that, therefore, no question of limitation arose.¹ In the undermentioned case,² where an application to set aside an *ex parte* decree was dismissed for default and the applicant made a further application to restore the prior application to file, it was held by the Allahabad High Court that the second application might be treated as an original application to set aside

Note 13

1. (1935) A I R 1935 Cal 506 (507) 62 Cal 1057 157 Ind Cas 876, *Dulal Chandra v. Atul Krishna*

Note 14

1. (1936) A I R 1936 Rang 305 (305) 164 Ind Cas 286, *Jagadamma Pandit v. Naresh Pandey*
 (1929) A I R 1929 Lah 235 (236) 116 Ind Cas 620, *Charan Das v. Firm Puran Lal Gobind Prasad*
 (1930) A I R 1930 Lah 192 (192) 124 Ind Cas 673, *Tota v. Badri Pershad*
 (1928) 109 Ind Cas 82 (82) (Lah), *Karam Singh v. Barkat Ram*
 (1929) 120 Ind Cas 591 (595) (Lah), *Mathra Das & Sons v. Kanshi Ram*
 (1932) 139 Ind Cas 131 (131) (Lah), *Tippar Chand Lakshmi Chand v. Habib-ul-Rahman*
 (1925) A I R 1925 Lah 639 (639) 92 Ind Cas 272, *Dittu Ram v. Nawab*
 (1918) A I R 1918 Lah 268 (268) 46 Ind Cas 777, *Sughru Mal Haracharan Das v. Sham Lal Gokal Chand*
 (1928) 107 Ind Cas 284 (284) (Lah), *Mt. Rajo v. Ali*
 [But see (1924) A I R 1924 Lah 233 (233) 73 Ind Cas 34, *Nikhata v. Azam Singh*]
 2. (1926) A I R 1926 Lah 379 (380) 95 Ind Cas 124 7 Lah 161, *Piroj Shah v. Qarib Shah*
 3. (1938) A I R 1938 Cal 535 (537), *Bengal Coal Co. Ltd. v. Baul Chandra Mukherji*

Note 15

1. (1920) A I R 1920 Lah 69 (70) 55 Ind Cas 824, *Earkat Ullah v. Fazal-i-Maula*.
 2. (1924) A I R 1924 All 503 (504) 78 Ind Cas 858 46 All 319, *Pitambara Lal v. Dulce Singh*

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Section 6 of the Act is limited in its applicability to suits and *applications for execution* and, consequently, cannot be taken advantage of for making an application governed by this Article.⁵

10. Exclusion of time under Section 14. — In computing the period of limitation prescribed by this Article, the time during which the applicant has been prosecuting another civil proceeding in a wrong Court may be excluded under the provisions of Section 14 *ante*, if the conditions of that Section are satisfied.¹

11. Section 18 and this Article. — Section 18 can be availed of by an applicant to set aside an *ex parte* decree, where he has been kept by fraud from the knowledge of his right to apply. See Notes to Section 18 *ante*. But the fraud must be such as to have kept him from knowledge of his *right* to apply and not such as has prevented him from *exercising* his right. Where the petitioner alleged that he went to the decree-holder and asked him about the decree and the latter said that he would come and settle things with him, it was held that the fraud alleged was not of the nature contemplated by Section 18 and that it did not affect limitation.¹ The fact that an *ex parte* decree has been obtained by fraud is not a ground for postponing the period of limitation under Section 18.² Where the holder of a preliminary decree represented to the judgment-debtor that he should not and need not appear in the final decree proceedings on the assurance that such proceedings would be dropped, but nevertheless, continued the proceedings and obtained a final decree, it was held that fraud such as is contemplated by Section 18 was practised on the judgment-debtor and that Section 18 could be availed of by him in an application to set aside the *ex parte* decree.³

12. Section 22 and this Article. — See Note 3 to Section 22, *ante*.

13. Parties to application. — There is no provision in the Civil Procedure Code requiring that persons in whose favour an *ex parte* decree has been passed should be named in the application to set aside such decree. If the application is made in time, the fact that

5. (1910) 8 Ind Cas 543 (544) : 35 Mad 678, *Chidambaram Chetty v. Karuppan Chetty*.

(1917) A I R 1917 Lah 144 (146) : 37 Ind Cas 292 : 1916 Pun Re No. 101, *Manohar Lal v. Mt. Sadiqa Begam*.

Note 10

1. (1932) A I R 1932 All 340 (312) : 54 All 423 : 140 Ind Cas 178, *Raghunandan Chaube v. Bhuwal Tewari* (A I R 1923 All 319 held not correctly decided)

(1910) 6 Ind Cas 154 (156) (Cal), *Baturuddin Mondal v. Sonauliah Mondal*.

(1920) A I R 1920 Bom 351 (352) : 57 Ind Cas 551, *Ibrahim Harun v. Jusaf Hussain*.

Note 11

1. (1933) A I R 1933 Rang 110 (111) : 144 Ind Cas 950, *Ramanathan Chettyar v. Baldeo Singh*.

2. (1920) A I R 1920 Lah 261 (261) : 57 Ind Cas 15, *Mt. Lal Devi v. Ariar Nath*.

3. (1926) A I R 1926 Nag 338 (339) : 91 Ind Cas 56, *M. B. Kinkhede v. Mohanya*.

3. "By a person dispossessed." — As seen in the foregoing Note, this Article applies to applications under Order 21 Rule 100, Civil Procedure Code. That Rule provides for applications by a *person other than the judgment-debtor*. The use of the words "by a person" in this Article, which is very wide, has however led to a conflict of judicial decisions as to whether this Article applies also to applications by a *judgment-debtor* complaining of delivery of property in excess of what has been decreed or sold. In the earlier cases decided by the High Courts of Allahabad,¹ Madras² and the Chief Court of Oudh,³ it was held that this Article is wide enough to include applications by the judgment-debtor who has been dispossessed of immovable property and who disputes the right of the decree-holder or purchaser to be put into possession. But in later cases the High Court of Allahabad,⁴ a Full Bench of the High Court of Madras⁵ and the Chief Court of Oudh⁶ have taken a contrary view and held that this Article does not apply to applications by judgment-debtors, but applies only to applications by a person other than the judgment-debtor as under Order 21 Rule 100 of the Civil Procedure Code. The reasoning of the Full Bench of the High Court of Madras for taking the latter view is that the provision in Section 230 of the Code of Civil Procedure, 1859, was re-enacted as Article 158 in Act 9 of 1871 and subsequently as Article 165 of the Limitation Acts of 1877 and 1908, and that inasmuch as Section 230 applied only to obstructions and dispossession of a person *other than the defendant*, the Legislature in re-enacting that Section in Article 158 of the Act of 1871 must have intended the Article to apply only to cases covered by Section 230, *viz.*, applications by third parties. The High Courts of Bombay,⁷ Calcutta,⁸ Lahore⁹ and the Judicial Commissioner's Court of

Note 3

- 1 (1900) 25 All 343 (316) 1903 All W N 50, *Har Din Singh v. Lachman Singh*

- (1891) 1 Mad L Jour 42 (43), *Vythilinga Muppanar v. Seethalakshmi Ammal*
3. (1914) A I R 1914 Oudh 270 (271) 17 Oudh Cas 94 24 Ind Cas 137, *Raja Ram v. Itraj Kunwar*

- (1902) 6 Oudh Cas 41 (46), *Jagan Nath v. Datta*

4. (1916) A I R 1916 All 104 (106) 39 All 339 34 Ind Cas 231, *Abdul Karim v. Mt. Islamunnissa Bibi*

5. (1919) A I R 1919 Mad 269 (271) 42 Mad 753 53 Ind Cas 437 (F B), *Thattantavita v. Kombi Ahasan*

- 6 (1929) A I R 1929 Oudh 76 (79) 115 Ind Cas 444 4 Luck 209, *Mt. Jilas v. Abdul Rahman*

- 7 (1922) A I R 1922 Bom 271 (272, 273) 68 Ind Cas 349 46 Bom 1031, *Rasul Malik Panjar v. Amina Hanif*

- (1931) A I R 1931 Bom 446 (447, 448) 133 Ind Cas 858, *Gangadhar Martand v. Jagmohandas Varjandas*

- 8 (1923) A I R 1923 Cal 287 (288) 67 Ind Cas 663, *Bahar Das Pal v. Girish Chandra Pal*

[See however (1881) 7 Cal 91 (96) 9 Cal L R 53, *Mahomed Hesseer v. Kukul Singh*]

9. (1919) A I R 1919 Lah 430 (432), *Sharfu v. Mir Khan*.

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Upper Burma¹⁰ have also preferred to follow the latter view, so that the present accepted view of practically all the Courts is that this Article does not apply to applications by the judgment-debtors. According to the latter decisions, applications by the judgment-debtors are governed by Article 181 of the Act.

4. "Dispossessed," meaning of. — In order to sustain an application under Order 21 Rule 100 of the Code of Civil Procedure, the applicant thereunder must have been actually dispossessed. Mere symbolical delivery of possession does not amount to dispossession so as to entitle a person to apply under that Rule.¹ Where, however, actual possession is delivered to the purchaser in court-sale, in spite of objection by a third party and in the presence of the latter's agent, he is dispossessed and will be estopped from disputing the possession of the purchaser more than twelve years after such dispossession.²

5. Starting point of limitation. — Under this Article limitation begins to run from the date of dispossession.¹ Where possession is delivered by a Court Amin, the date of delivery of possession by the Amin and not the date of his *report* as to such delivery, is the starting point.²

In computing the thirty days' period of limitation, the date of dispossession must be excluded. Thus, where the dispossession took place on 14th December 1875, and the application was filed on 14th January 1876, 13th January 1876 being a holiday, it was held that the application was not barred.³

Where an application under Order 21 Rule 100 of the Code of Civil Procedure has been filed within thirty days from the date of dispossession impleading the purchaser who dispossessed the applicant as a party, such application cannot be considered to be defective and barred simply because the sub-purchaser has not been originally added as a party.⁴

10. (1918) A I R 1918 Upp Bur 8 (8) : 46 Ind Cas 323 : 3 Upp Bur Rul 79.
Maung Tha v. Ma Pyu

Note 4

1. (1903) 30 Cal 710 (712), *Ibrahim Mullick v. Ramjadu Rakshit*.
2. (1903) 27 Mad 262 (266, 267), *Venkatakrishna Row v. Venkappa*.

Note 5

1. (1902) 6 Oudh Cas 44 (47), *Jagannath v. Datta*
2. (1864) 1864 Suth W R Mis 18 (18), *Kasheenath Doss v. Bhowanes Doss*.
3. (1878) 2 Bom 673 (675), *V. K. Gurjar v. V. D. Darce*.
4. (1931) A I R 1931 Cal 385 (387) : 59 Cal 55 : 132 Ind Cas 631, *Indubhushan Das v. Haricharan Mandal*.

166. Under the same Code to set aside a sale in execution of a decree (including any such application by a judgment-debtor).	Thirty days.	The date of the sale.	Article 166
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Synopsis

1. Legislative changes.
2. Scope of Article.
3. "Under the same Code."
4. "To set aside."
- 4a. Void sale — Application in respect of.
5. "Decree."
6. Adjustment of decree after sale — Application to record adjustment and set aside sale — Limitation.
7. Application under Order 21 Rule 89, Civil Procedure Code.
8. Application on ground of judgment-debtor having no saleable interest in the property — Limitation.
9. Sale in insolvency proceedings—Applicability of Article.
10. Applicability of Article to application to set aside sale under Section 173 of the Bengal Tenancy Act.
11. Parties to application to set aside sale — Effect of joining them after limitation.
12. Notice to persons affected by application to set aside sale — Limitation.
13. Application by notice of motion, when deemed as made.
14. Suit to avoid sale treated as proceeding under Section 47, Civil Procedure Code — Limitation.
15. Setting aside of sale under inherent power — Limitation.

* Act of 1877, Articles 166 and 172

<p>Court.</p> <p>172.—By a purchaser at an execution-sale, to set aside the sale on the ground that the person whose interest in the property purported to be sold had no saleable interest therein.</p>	<p>Thirty days.</p> <p>Sixty days</p>	<p>The date of the sale.</p> <p>The date of the sale.</p>
<p align="center">Act of 1871</p>		
<p>159.—To set aside a sale in execution of a decree, on the ground of irregularity in publishing or conducting the sale</p>	<p>Ditto</p>	<p>The date of the sale.</p>

Act of 1859
No corresponding provision.

Article 166
Note 1

16. Fresh ground for setting aside sale, if can be urged after limitation.
17. Extension of time under this Article.
18. Computation of limitation under the Article — Effect of fraud.
19. Defence not barred.
20. Special or local law, period prescribed by.
21. Starting point of limitation.
22. Order setting aside sale subsequently reversed — Limitation for fresh application to set aside sale.

Other Topics

Acceptance of highest bid by Court—If necessary to complete sale	...	See Note 21, Pts 3, 4
Article does not override special provisions of Civil Procedure Code	...	See Note 2, Pt. 13
Completion of sale	... ..	See Note 21, Pts. 2 to 7 and F-N (5)
Confirmation of sale is no bar to application within time	...	See Note 2, Pt. 15
Date of sale and not that of confirmation is starting point	...	See Note 21, Pt. 1
Exclusion of time under Section 14	...	See Note 17, Pts. 9, 10
Mere deposit of amount within thirty days — Not sufficient to prevent bar of limitation	... ..	See Note 7, Pt 4
Right to apply to set aside sale arising subsequent to sale—Article does not apply	...	See Note 2, Pts. 16, 17
Section 4 applies	... ..	See Note 17, Pt 11
Sections 5 and 6—Applicability	... ..	See Note 17, Pts. 4 to 6
Sections 12, 13—Not applicable	... ..	See Note 17, Pts. 7, 8
Voidable sales	... ..	See Note 2, Pts 12, 14

1. Legislative changes.

Position under Act of 1859 : The Act of 1859 (which only applied to *suits* and not to appeals or applications) did not contain any provisions corresponding to this Article. But, the Civil Procedure Code of 1859, Section 256, provided that at any time within thirty days from the date of the sale, an application might be made to the Court to set aside the sale on the ground of any material irregularity in publishing or conducting the sale.¹ It was held with reference to this provision that the Court had a *discretion* to receive an application under the Section even after the period of thirty days prescribed by it.²

Position under Act of 1871 : A provision corresponding to this Article was for the first time enacted in the Act of 1871, as Article 159. But this Article only applied to an application to set aside a

Article 166 — Note 1

1. (1866) 6 Suth W R Mts 122 (122), *Ishan Chunder Dutt v. Mothooranath Doss*
[See (1870) 7 Bom H C R A C 74 (77), *Var Singappa v. Sadashuappa*.
(Section 256 did not apply where the sale was attacked on the ground of fraud)]
2. (1872) 18 Suth W R 333 (334), *Raj Coomarr Singh v. Lalljee Sahoo*.
(1872) 18 Suth W R 11 (11, 12), *Poulson v. Dunn*.
(1872) 18 Suth W R 11n (12n), *In re Umrito Lall Bose*.

sale on the ground of irregularity in publishing or conducting the sale, and did not apply to applications based on other grounds

Article 166
Note 1

Changes made by Act of 1877 : The Act of 1877 contained two provisions, viz. Articles 166 and 172 specifically relating to this subject

Article 166, when it was originally enacted, merely reproduced Article 159 of the Act of 1871. But, by Act 12 of 1879, the Article was enlarged so as to include an application to set aside a sale on the ground that the decree-holder had purchased the property without the permission of the Court. Thus, the Article, as amended, applied to two cases :

1. applications based on the ground of irregularity in publishing or conducting the sale, and
2. applications based on the ground that the decree-holder had purchased the property without the permission of the Court³

The Article did not apply to applications based on other grounds.⁴ For instance, it did not apply to applications based on the ground of fraud in the execution proceedings. Such applications were held to fall within the residuary Article 178 of the Act⁵ (now Article 181).

Article 172 of the Act of 1877 provided a period of sixty days for an application to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property sold.⁶

Changes made by Act of 1908 :

1. The words relating to the grounds on which the application was made were omitted so as to make the Article applicable to *all* applications to set aside an execution sale *irrespective of the ground on which it was based.*⁷

3. (1903) 13 Mld L Jour 231 (235), *Maumuthu Udayan v Subbaraya Pillai*.
[But see (1897) 11 Bom 588 (590), *Chintamanrai Natu v Vithabas*.
(The view taken in this case that the Article did not apply to application to set aside sale on ground of decree holder having purchased without permission of Court, is not correct)]

4 (1900) 22 All 376 (377) 1900 All W N 129, *Lalman Das v Jagan Nath*.
(1897) 24 Cal 707 (709, 710) 1 Cal W N 534, *Chand Monnee Dasya v Santo Monnee Dasya*
(1898) 3 Cal W N 833 (336), *Luchmipat v Mt Mandil Koor*
(1911) 9 Ind Cas 584 (585) (Cal), *Lakshmi Charan Sen v Sris Chandra Roy*.
(1910) 7 Ind Cas 48 (48) (Cal), *Sadek Sardar v Kali Prasanna Saha*

5. (1885) 9 Bom 468 (471), *Sakharam Gound v Damodar Akharam*
(1899) 26 Cal 324 (331) 3 Cal W N 899, *Bhubon Mohun Pal v Nunda Lal Roy*
(1898) 2 Cal W N 691 (693), *Nimai Chand Kanjia v Dano Nath Kanjia*
(1907) 5 Cal L Jour 328 (332), *Deendra Nath v. Prasanna Kumar*.
(1909) 2 Ind Cas 844 (845) 36 Cal 651, *Purna Chandra Mandal v Anukul Biswas*.

(1919) A I R 1919 Pat 574 (576) 71 Ind Cas 202, *Laidee Singh v Meghu Singh*

(1900) 5 Cal W N 265 (268), *Sarat Kumari Deb v Nimai Charan Deb*

6. (1905) 2 Cal L Jour 506 (507), *Hari Charn Bose v Hari Das Bose*

7 (1920) A I R 1920 Pat 725 (725) 57 Ind Cas 404, *Jaythar Misur v Dharma Khatica*.

Article 166
Notes
1—2

2. The words "under the same Code" (meaning "under the Civil Procedure Code") were added in the beginning of the Article.
3. The special provision contained in Article 172 of the Act of 1877 relating to applications for setting aside the sale on the ground of the judgment-debtor having no saleable interest in the property was repealed, so that such applications also came within the thirty days' rule under this Article, whereas under Article 172 of the Act of 1877 a period of 60 days was prescribed for such applications.

Amendment after 1908 : The words "including any such application by a judgment-debtor" were added at the end of the Article by Act 1 of 1927.

2. Scope of Article. — This Article prescribes the period of limitation for an application under the Civil Procedure Code to set aside a sale in execution of a decree. As seen in Note 1 above, the scope of the Article in the present Act has been widened so as to make it applicable to *all* applications under the Code to set aside a sale in execution, irrespective of the ground on which or the provision of the Code under which the application is made.¹ But, notwithstanding this, it was held in some decisions that the Article

- (1924) A I R 1924 Rang 124 (125) : 1 Rang 533 : 77 Ind Cas 368, *Ma Pwa v. Mahomed Tambi*.
 (1915) A I R 1915 Cal 268 (271) : 27 Ind Cas 294, *Arjun Das v. Gunendra Nath Basu*.
 (1924) A I R 1924 Mad 817 (818) : 81 Ind Cas 844, *Alliar Rowther v. Narayana Kudumban*.

- (1911) 11 Ind Cas 295 (298) (Cal), *Kishori Das v. Mukund Lal Dutt*. (Article in Act of 1908 applies to application made after coming into force of that Act though sale was prior to coming into force of the Act)

Note 2

1. (1924) A I R 1924 Mad 137 (138) : 47 Mad 525 : 77 Ind Cas 631, *Paramita*.
- (1922) A I R 1922 Pat 507 (509) : 2 Pat 65 : 77 Ind Cas 957, *Ramdhuri Chowdhuri v. Deonandhan Prasad Singh*. (Do)
- (1924) A I R 1924 Rang 124 (124, 125) : 1 Rang 533 : 77 Ind Cas 368, *Ma Pwa v. Mahomed Tambi*. (Do.)
- (1920) A I R 1920 Pat 715 (715) : 57 Ind Cas 261, *Salhi Rai v. Ram Autar Rai*. (Do.)
- (1935) A I R 1935 All 889 (890, 891) : 156 Ind Cas 389, *Gulzari Lal v. Sheo Charan Lal*.
- (1932) A I R 1932 Cal 627 (629) : 140 Ind Cas 732, *J. C. Galstaun v. Syed Mohammad Hussain*.
- (1920) A I R 1920 Cal 165 (166) : 54 Ind Cas 431 : 46 Cal 975, *Satish Chandra v. Nishi Chandra Dutta*. (Where the applicant to set

did not apply to an application under Section 47 of the Code to set aside a sale.² In order to make it clear that the Article applies also to such applications, the words "including any such application by a judgment-debtor" were added at the end of the Article by Act 1 of 1927.³ It is now clear that whether the application is under any of the Rules in Order 21 like Rule 72 and Rules 89 to 91 or is one under Section 47, the Article applicable is this Article.⁴

(1938) A I R 1938 Nag 558 (559), *Maroti v. Kisanlal*.

(1937) A I R 1937 Mad 500 (501) 172 Ind Cas 247, *Subramania Asari v. Ramaswami Pillai*.

(1923) A I R 1923 Mad 48 (49) 69 Ind Cas 1001, *Subramanyan Nambudri v. V. K. V. Kammathi*. (Court extending time for deposit by the auction-purchaser under O 21, R. 85, C. P. C. or accepting a

Subramania Moorthan. (A sale held without notice of sale proclamation and an application to set

) 30 Nag L R 135, *Sobha*

not liable to attachment and sale — Application by judgment debtor to set aside sale is within Article)

(1921) A I R 1921 Pat 145 (149) 61 Ind Cas 623, *Das Narayan Singh v. ...*

(1924) A I R 1924 Mad 817 (818) 81 Ind Cas 844, *Alliar Bowther v. Narayana Kudumban* (Do)

(1919) A I R 1919 Lah 152 (154) 51 Ind Cas 447, *Bashir Ram v. Hassan Muhamad* (Do)

(1921) A I R 1921 Bom 285 (287) 45 Bom 174 58 Ind Cas 231, *Bharchand Kirparam v. Ranchhodas Manchharam*. (Sale held in contravention of O 34, R 14 is voidable and not void)

(1916) A I R 1916 Bom 61 (63) 41 Bom 357 : 39 Ind Cas 3, *Ganesh Narayan v. Gopal Vishnu* (Do)

(1931) A I R 1931 All 314 (314) 151 Ind Cas 244, *Narotam Das v. Bhagwan Das* (Application under O 21, R 90—Article applies)

2. See (1917) A I R 1917 Low Bur 60 (51) 37 Ind Cas 627, *Ramaswami Chetty v. Maung Tha*

(1928) A I R 1928 Cal 865 (866) 116 Ind Cas 634, *Hafeez Usir Ali v. Naumannessa Bibi*

(1918) A I R 1918 Cal 171 (173) 46 Ind Cas 221, *Ram Kinkar Tewari v. Shikhi Ram Panja*

3. See Statement of Objects and Reasons, Gazette of India, dated 29th January 1927, Part V, Page 5 (Page xxxiv in Vol I)

4. (1937) A I R 1937 Rang 126 (128) 169 Ind Cas 967 1937 R L R 164, *Ma W's Gyan v. Maung Than Byu*.

(1931) A I R 1931 All 145 (146) 130 Ind Cas 708, *Kashi Ram v. Mt. Hasmat Banco*

(1938) A I R 1938 Cal 113 (116, 117) 1 L R (1938) 1 Cal 250, *Nirode Kish Roy v. Rai Harendra Nath*

(1931) A I R 1931 Cal 425 (426) 131 Ind Cas 561, *Mt. Ku's Faru Bibi v. Jitendra Nath Roy*.

Article 166 Note 2

But, in order that this Article may apply, the application must be one to *set aside* a sale in execution.^{4a} This necessarily implies that the sale in respect of which the application is made is binding on the applicant till it is set aside. Where the sale is *void*, it need not be set aside and can be disregarded without any *proceeding to set it aside*.⁵ In fact, in such cases, there is nothing to be set aside and hence, there can be no application to *set aside* the sale. Hence, the Article can have no application to such cases.⁶ Such a sale can, however, be *declared* to be void⁷ and an application may be made to the executing Court to make such a declaration. But such an application will not be one to *set aside* the sale and therefore

[But see (1933) A I R 1933 Lah 570 (573) : 145 Ind Cas 113, *Hansraj v. Karam Chand*. (The unqualified observation in this decision that limitation for lodging objections under S. 47, O. P. C., is governed by Article 181 and not by Article 166 is not correct.)]

4a (1927) A I R 1927 Cal 818 (819) : 54 Cal 498 : 103 Ind Cas 621, *Satindra*

Original Side Rules
it complete on pro-
Auction-purchaser
sale under certain

conditions — application must show that he, auction-purchaser, was not bound to complete sale and asking for refund of purchase-money — Application is not one to *set aside* sale and is therefore not within this Article)

5. (1930) A I R 1930 Pat 153 (154) : 119 Ind Cas 891, *Moinuddin Meerza v. Mohamed Amin*.

(1929) A I R 1929 Nag 305 (311) : 116 Ind Cas 65, *Sunderbhai v. Bapuna*. (An application for review of the order confirming sale can, in such a case, be treated as an application under Sec. 47, O. P. C., and governed by Article 181.)

(1916) A I R 1916 Mad 83 (85) : 29 Ind Cas 314 : 33 Mad 1076, *Payidanna v. Lakshminarasamma*.

(1904) 32 Cal 296 (312) : 32 Ind App 23 : 9 Cal W N 201 : 2 All L Jour 71 : 7 Bom L R 1 : 1 Cal L Jour 584 : 8 Sar 734 (P O), *Kharajmal v. Daim*.

G. (1936) A I R 1936 Pat 496 (497) : 163 Ind Cas 34, *Firm Ramanand Ganpat Rai v. Rakhal Mandal*.

(1937) A I R 1937 Rang 126 (128) : 169 Ind Cas 967 : 1937 R L R 164, *Ma We Gyan v. Maung Than Byu*.

(1933) A I R 1933 Cal 113 (116, 117) : I L R (1933) 1 Cal 280, *Nirode Kahi Roy v. Rai Harendra Nath*.

(1930) A I R 1930 Mad 12 (15) : 123 Ind Cas 24, *Chengalraya Reddy v. Kollapuri Reddi*.

(1930) A I R 1930 Lah 17 (18) : 125 Ind Cas 53, *Lakshmi Chand v. Phul Chand*.

(1924) A I R 1924 Mad 431 (437) : 47 Mad 288 : 60 Ind Cas 92 (F B), *Rajagopala Aiyar v. Ramanujachariar*.

(1924) A I R 1924 Cal 638 (639) : 51 Cal 224 : 82 Ind Cas 848, *Jogeshwar Mahata v. Jhapal Santal*.

(1921) A I R 1921 Cal 609 (611) : 64 Ind Cas 476, *Gurudas Biswas v. Dhowanipore Zamindary Co., Ltd.*

[But see (1922) A I R 1922 Mad 417 (420) : 70 Ind Cas 743, *Ganapathy Mudaliar v. Krishnamachari*. (Submitted not correct.)]

7. See (1921) 60 Ind Cas 529 (530) (Pat), *Ghanshyam Chaudhury v. Basdeb Jha*. (Notice under S. 159 (b), Bengal Tenancy Act, not having been issued, sale was void—Suit was held to be within time being governed by Article 120)

will not come within the purview of this Article.⁸ Even where an application in respect of a void sale purports to be one to set aside the sale, it is really one to obtain a declaration that the sale is void and, as such, is not governed by this Article. The undermentioned decisions will fall within this principle.⁹ Such applications, however, are not entirely exempt from the law of limitation¹⁰ They will be governed by Article 181, *infra*, and must be brought within three years of the accrual of the right to apply¹¹

Where, however, the sale is not void but is only voidable, it can only be avoided by means of an application to set it aside and such application must be made within the period of 30 days prescribed by this Article.¹² The object of providing such a short period of limitation for the application is to see that titles arising from judicial sales are settled as soon as possible¹³

For instances of void and voidable sales, see the undermentioned cases.¹⁴

8. (1938) A I R 1938 Cal 113 (115, 116) I L R (1938) 1 Cal 280, *Nirode Kals Roy v. Bai Harendra Nath*
- (1928) A I R 1928 Cal 60 (62) 105 Ind Cas 65 55 Cal 96, *Monmatha Nath Ghose v. Luchmi Debi*
- (1931) A I R 1931 Lah 586 (589) 182 Ind Cas 493, *Sundar Das v. Nikka*
- 9 (1934) A I R 1934 All 314 (315) 151 Ind Cas 244, *Narotam Das v. Bhagwan Das*
- (1920) A I R 1920 Mad 402 (402, 403) . 43 Mad 313 . 56 Ind Cas 260, *Seshagiri Rao v. Sreenivasa Rao* (Property belonging to defendant exempted from decree — Sale of such property in execution — Sale is void *ab initio*)
10. (1932) A I R 1932 Cal 381 (381) : 137 Ind Cas 378, *Surja Kanta Das v. Jogendra Nath Dutt*.
[But see (1927) A I R 1927 Cal 761 (782) . 54 Cal 624 105 Ind Cas 193, *Umamoyee Dasya v. Jatan Bewa* (Sale being nullity, no question of limitation arises—View not correct)]
11. (1926) A I R 1926 Pat 397 (398) : 97 Ind Cas 793, *Bihari Lal Mitter v. Tanuk Lal Mander*.
See also cases in Foot-note 6, above.
12. (1923) A I R 1923 Mad 48 (49) . 69 Ind Cas 1001, *Subramanyam Nambudri v. V. K. V. Kannmathi*. (Deposit under O. 21, R. 85 paid beyond time and accepted by Court—Sale merely irregular and not a nullity)
13. (1919) A I R 1919 Bom 130 (131) : 43 Bom 735 . 53 Ind Cas 135, *Raoji Baburao v. Bansilal Narayan*.
14. (1900) 25 Bom 337 (347, 349) . 27 Ind App 216 . 5 Cal W N 10 . 10 Mad L Jour 868 : 2 Bom L R 927 : 7 Sar 739 (P G), *Malkarjun v. Narhari*. (Erroneous decision of Court as to who are legal representatives)
- (1924) A I R 1924 Mad 137 (138) : 47 Mad 525 : 77 Ind Cas 631, *Paramasua Thevar v. Pulukharappa* (Failure to bring on record legal representative of deceased judgment-debtor—Sale irregular, not void)
- (1922) A I R 1922 Mad 307 (309) : 68 Ind Cas 667, *Ragunathasami v. Gopauj*
- (1895)

Article 166 Note 2

Where an application to set aside a sale is within time under this Article, it is not barred merely because it is made after the confirmation of the sale.¹⁵

The Article is subject to the general principle that limitation cannot begin to run before the accrual of the cause of action and that the Articles in the Schedule can only apply to cases in which the cause of action has arisen at the time specified in the third column of the Article as the starting point of limitation. (See Notes to Section 9, *ante*.) Hence, where the right to apply to set aside an execution sale arises *subsequent* to the sale (which is the starting point of limitation under this Article), this Article will not apply.

- (1925) A I R 1925 Pat 384 (386, 387) : 86 Ind Cas 141, *Barhamdeo Narayan v. Saligram Sahay*. (Do)
- (1923) A I R 1923 Cal 302 (303) : 75 Ind Cas 196, *Saradindu v. Gosta Behari*. (Purchase by decree-holder without permission of Court is irregular, not void)
- (1916) A I R 1916 Bom 61 (63) : 41 Bom 357 : 39 Ind Cas 3, *Ganesh Narayan v. Gopal Vishnu*. (Do)
- (1918) A I R 1918 Cal 171 (173) : 46 Ind Cas 221, *Ram Kinkar Tewari v. Sthiti Ram Panja* (Failure to serve notice under O 21 R 22 makes sale void.)
- (1924) A I R 1924 Mad 431 (436) : 47 Mad 288 : 80 Ind Cas 92 (F B), *Rajagopala Ayyar v. Ramanujachariar*. (Do)
- (1921) A I R 1921 Cal 609 (611) : 64 Ind Cas 476, *Gurudas Biswas v. Bhowanipore Zamindary Co., Ltd.* (Do.)
- (1932) A I R 1932 Cal 381 (381) : 137 Ind Cas 378, *Surja Kanta Das v. Jogendra Nath Dutta* (Do)
- (1930) A I R 1930 Pat 153 (154) : 119 Ind Cas 891, *Momuddin Meerza v. Mohammad Amin*. (Do.)
- (1936) A I R 1936 Mad 205 (207) : 59 Mad 461 : 162 Ind Cas 156 (F B), *Kanchamalai Pathar v. Shahaji Rajah Sahib*. (Do)
- (1910) 5 Ind Cas 390 (394, 395) (Cal), *Mrs. Leticia Ashton v. Madhabmoni Dasi*. (Omission to serve notice under Order 21, Rule 22 makes the sale voidable)
- (1924) A I R 1924 Rang 124 (125, 126) : 1 Rang 533 : 77 Ind Cas 368, *Ma Pua v. Md. Tambi*. (Absence of attachment in execution sale — Sale is merely irregular and not void.)
- (1916) A I R 1916 Mad 33 (35) : 38 Mad 1076 : 29 Ind Cas 314, *Pasumaris Payudanna v. Ganti Lakshminarasamma* (Minor legal representative of deceased judgment-debtor brought on record without being represented by guardian *ad litem*—Sale is void and need not be set aside)
- (1934) A I R 1934 All 314 (315) : 151 Ind Cas 244, *Narotam Das v. Bhagwan Das* (Sale by Civil Court, of agricultural land contrary to notification by Government under S 68, C. P. O., requiring that such sale must be by the Collector—Sale is void)
- (1910) 6 Ind Cas 713 (715) : 1910 Pun Re No. 40, *Madho Lal v. Jawahir Singh*. (Error in warrant of attachment is only a material irregularity —The sale is not void but voidable.)
- (1904) 31 Cal 385 (392), *Kohil Singh v. Edal Singh*. (Omission to comply with the provisions of S. 290, C. P. C. of 1882 (O. 21 R. 68) cannot nullify a sale)
- (1938) A I R 1938 Cal 734 (736), *Sarifa Khatoon v. Assmannessa Bibi*. (Absence of necessary notice under O. 21 R. 16 is not a mere irregularity but vitiates the whole execution proceedings and sale.)

See also cases in Foot-Note (1) above.

15. (1915) A I R 1915 Low Bur 97 (97) : 27 Ind Cas 656, *Ismail v. Vistanadan Chetty*.

Illustrations

Article 166
Notes
2—5

1. A certain property is sold in execution of an *ex parte* decree and purchased by the decree-holder himself. Subsequently, the decree is set aside. In such cases, the judgment-debtor is entitled to apply to set aside the sale. But, the application will be governed not by this Article, but by Article 181, *infra*. The reason is that the right to apply in this case arises only on the setting aside of the *ex parte* decree, i. e., subsequent to the time specified in the Article as the starting point of limitation.¹⁶
2. A certain property was sold first to A in execution. Then, before the confirmation of the sale, the same property was sold to B. The sale to A was then confirmed. B thereafter applied to have the sale to himself set aside on the ground that the judgment-debtor had no saleable interest in the property. It was held that B's application was not governed by Article 166, but by Article 181, the reason being that before the confirmation of the sale to A, B had no right to apply to set aside the sale at all.¹⁷ In other words, B's right to apply only accrued after the time specified in the Article as the starting point of limitation.

The Article is a *general* provision and cannot override the special provisions of any particular Section or Rule of the Civil Procedure Code to the contrary. Thus, under Order 34 Rule 5 of the Code, a judgment-debtor can, after depositing the requisite amount, have the sale under a mortgage decree set aside *at any time before the confirmation of the sale*, although the period of thirty days prescribed by this Article may have expired.¹⁸

3. "Under the same Code." — These words refer to the Civil Procedure Code of 1908, which is mentioned in the previous Article, *viz.*, Article 165. It has been held that an appeal under the Civil Procedure Code does not mean only an appeal the *right* to prefer which is conferred by the Code itself and that the expression would include an appeal the *procedure* with respect to which is governed by the Code.¹ On the same reasoning, it is conceived, that an application under the Code will include an application the *procedure* in respect of which is governed by the Code, though the right to make the application is not conferred by the Code. See also Note 10, *infra*.

4. "To set aside." — See Note 2 above.

4a. Void sale — Application in respect of. — See Note 2 above.

5. "Decree." — See Note 9, *infra*.

16 (1919) A I R 1919 Bom 175 (175, 176) 43 Bom 235 48 Ind Cas 130, *Shitbas Babya Suami v. Yeshu Chiao Nayalim*

17. (1910) 6 Ind Cas 804 (506) (Cal), *Gopal Saran Narayan Singh v. Mahomed Shekh Ashkan*

18. (1937) A I R 1937 Mad 560 (561) 172 Ind Cas 247, *Subramanya Asari v. Ramaswami Pillai*

Note 3

1 (1886) 18 Cal 221 (224), *Aga Mahomed Hamadani v. Cohen*.

(1920) A I R 1920 Mad 407 (408) 43 Mad 51 53 Ind Cas 405, *Ramaswami Pillai v. Tahsildar of Madura*

Article 166
Note 6

6. Adjustment of decree after sale — Application to record adjustment and set aside sale — Limitation. — Suppose, after the expiry of the period of limitation prescribed by this Article, an application is made to the Court alleging an adjustment of the decree subsequent to the sale, and praying that such adjustment should be recorded and certified and that the sale should be set aside. Can the adjustment be recorded and the sale set aside? The answer to this question depends on whether the purchaser is a stranger or is the decree-holder himself. In the former case, the adjustment of the decree as between the decree-holder and the judgment-debtor cannot affect the rights of the auction-purchaser and the sale cannot be set aside on the ground of such adjustment.¹ The only way in which such a sale can be got rid of is by means of an application under Order 21 Rule 89 within the period of limitation prescribed by this Article.² In *Nanhelal v. Umrao Singh*,³ the Privy Council observed as follows :

"In the first place, Order 21 Rule 2, which provides for certification of an adjustment come to out of Court, clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder and when no other interests have come into being. When once a sale has been effected, a third party's interest intervenes and there is nothing in this Rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale which has been duly carried out, are those embodied in Rule 89, viz., by depositing in Court the amount for the recovery of which the property was sold, together with five per cent. on the purchase-money which goes to the purchaser as statutory compensation, and this remedy can only be pursued within thirty days of the sale : See Article 166, Schedule 1, Limitation Act, 1908."

But, where the decree-holder himself is the purchaser, there being no third party's interests to be protected, the adjustment of the decree, though made after the execution sale, can be recorded under Order 21 Rule 2 of the Code and the sale set aside.⁴ The expiry of

Note 6

1. (1931) A I R 1931 P C 33 (85) : 180 Ind Cas 686 : 58 Ind App 50 : 27 Nag L R 95 (P O), *Nanhelal v. Umrao Singh*
- (1934) A I R 1934 Lah 503 (509) : 15 Lah 801 : 149 Ind Cas 445, *Gulab Singh v. Kishan Singh*
- (1932) A I R 1932 Lah 288 (289). 137 I C. 735, *Satia Nand v. Jhangu Ram*.
- (1911) 10 Ind Cas 148 (150, 151) (Cal), *Bibi Sharfan v. Mahomed Habibuddin*
- (1928) A I R 1928 Nag 136 (138, 143) : 103 Ind Cas 449, *Kabiruddin v. Krishna Rao*.
2. (1931) A I R 1931 P C 33 (85) 180 Ind Cas 686 : 58 Ind App 50 : 27 Nag L R 95 (P C), *Nanhelal v. Umrao Singh*.
3. (1931) A I R 1931 P C 33 (35, 36) : 130 Ind Cas 686 : 53 Ind App 50 : 27 Nag L R 95 (P C)
4. (1928) A I R 1928 Pat 40 (43) . 104 Ind Cas 753, *Shivaram Sand v. Manu Lal Khemka*.

the period of 30 days prescribed by this Article would be no bar to such a procedure.⁵ The reason is that where the parties to a proceeding enter into a *lawful* compromise, the Court is bound to recognise and give effect to such a compromise without going into the question as to whether the relief granted to either party by such compromise is barred by limitation or not. (See Note 20 to Section 3, *ante*)

Where one of the terms of the adjustment in such cases (i e. cases in which the decree-holder himself is the purchaser) is that the judgment-debtor must, as a condition of the adjustment being recorded and the sale being set aside, deposit in Court or pay to the decree-holder within a particular date, a certain amount, the Court cannot extend the time so fixed except with the consent of the parties.⁶

Article 166
Notes
6—7

7. Application under Order 21 Rule 89, Civil Procedure Code.

— This Article applies, *inter alia*, to an application to set aside a sale under O 21 R 89 of the Code,¹ which must, therefore, be made within thirty days of the sale. O. 21 R 92 requires that in such cases the deposit required by Rule 89 must be made within thirty days of the sale. Hence, it is necessary that both the application and the deposit required under Rule 89 must be made within 30 days of the sale.² Where, however, the fact that the deposit is made after the expiry of 30 days from the sale is due to the fault of the Court or its officers and not of the applicant, the deposit must be held to be in time, on the principle contained in the maxim *actus curiæ*

(1934) A I R 1934 Lah 508 (509) 15 Lah 801 149 Ind Cas 445, *Gulab Singh v. Kushan Singh*

(1936) A I R 1936 Oudh 55 (56) 11 Luck 418 157 Ind Cas 803, *Nand Kumar v. Maqsood Ali*

6. (1917) A I R 1917 Pat 344 (344) 39 Ind Cas 664, *Rameshwar Misser v. Sureshwar Misser*.

Note 7

1. (1931) A I R 1931 P C 33 (35, 36) 130 Ind Cas 686 58 Ind App 50 27 Nag

Channappa v.

ih

2 (1931) A I R 1931 P C 33 (35, 36) 130 Ind Cas 686 58 Ind App 50 27 Nag L R 95 (P C), *Nanhelal v. Umrao Singh*

(1917) A I R 1917 Mad 176 (176, 177) 33 Ind Cas 996, *Vanniasami Thevar v. Periyasami Thevar*

(1929) A I R 1929 Nag 10 (11) 106 Ind Cas 568, *Sadasheo v. Narayan*

(1937) A I R 1937 Pat 113 (115) 16 Pat 202 169 Ind Cas 453 (F B), *Bhagwat Narain v. Srinivas*

(1915) A I R 1915 Low Bur 97 (97) 27 Ind Cas 656, *Ismael Ali v. Vistandan Chetty*

[See (1918) 19 Ind Cas 475 (476) 37 Bom 387, *Ganesh Bab Naik v. Yathal Vaman Mahalinga* (The deposit need not be sufficient to meet the claims of other decree holders who may be entitled to rateable distribution)]

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neminem gravabit (an act of the Court shall prejudice no man).³

The mere deposit of the amount required under Rule 89 within thirty days of the sale will not prevent the bar of limitation under this Article. In order to prevent such bar, there must be an *application* to set aside the sale within thirty days from the sale.⁴ But, the application need not be in writing,⁵ nor need it be signed.⁶ It may be oral. In the undermentioned case⁷ it was held that an application under Rule 89 was good though it did not contain an *express* prayer for the setting aside of the sale.

8. Application on ground of judgment-debtor having no saleable interest in the property — Limitation. — Where property, in which the judgment-debtor has no saleable interest at

3 (1922) A I R 1922 All 195 (196) : 67 Ind Cas 321, *Durga Prasad v. Babu Lal*.
 (1915) A I R 1915 All 414 (415) : 37 All 591 : 30 Ind Cas 186, *Munnalal v. Radha Kishan*.

(1930) A I R 1930 Cal 249 (250) : 126 Ind Cas 207, *Rangini Sundari v. Hiralal Biswas*.

(1911) 10 Ind Cas 500 (501) : 10 Ind 500, *...*

(1910) 7 Ind Cas 52 (54) (Cal), *Pakturam Singh v. Kamini Mani Dasu*.

(1934) A I R 1934 Lah 875 (876) : 155 Ind Cas 603, *Buti Ram v. Sardar Singh*.

(1926) A I R 1926 Nag 331 (331) : 96 Ind Cas 376, *Raotmal v. Amarsingh*.

[See also (1906) 9 Oudh Cas 214 (216), *Radhe Lal v. Sheo Prasad*.

(1903) 6 Oudh Cas 68 (71), *Ram Nath v. Murlidhar*.

(1934) A I R 1934 Pat 336 (339) : 13 Pat 641 : 151 Ind Cas 618, *Lachmi Ojha v. Ram Ran Bijay Prasad Singh*.]

4 (1911) 9 Ind Cas 33 (33) (All), *Mathura Prasad v. Ram Lal*.

(1919) A I R 1919 Bom 180 (131) : 43 Bom 735 : 53 Ind Cas 135, *Raoji Baburao v. Bansilal Narayan*.

(1925) A I R 1925 Mad 639 (640) : 87 Ind Cas 437, *Pachiayal v. Vallimuthu Velan*.

(1922) A I R 1922 Mad 83 (83) : 66 Ind Cas 44, *Venkatasubba Rao v. Narayana Rao*.

(1917) A I R 1917 Mad 662 (662) : 32 Ind Cas 783, *Venkata Narasimha v. Lakshmi Narasimha*.

(1917) A I R 1917 Mad 225 (226) : 32 Ind Cas 45, *Parat Veetil Seethi v. Ambalath Veetil Kolathur Ahmad*.

(1925) A I R 1925 Oudh 411 (412) : 87 Ind Cas 722, *Ram Autar v. Sheo Piary Lal*.

[But compare (1905) 7 Bom L R 263 (264, 265), *Mathurji v. Kondaji*.

(Decision turning on construction of S. 310 A of the C. P. Code of 1882)]

5 (1929) A I R 1929 All 593 (596) : 119 Ind Cas 103 : 51 All 910, *Dip Chand v. Sheo Prasad*.

(1912) 13 Ind Cas 404 (405) (All), *Sarvas Begam v. Haider Shah*.

(1925) A I R 1925 Mad 909 (910) : 86 Ind Cas 498, *Murugappa Asari v. Shanmuga Mudaliar*.

(1914) A I R 1914 Mad 209 (209) : 22 Ind Cas 291, *Mariappa Annam v. Harishara Iyer*.

6. (1914) A I R 1914 Mad 209 (209) : 22 Ind Cas 291, *Mariappa Annam v. Harishara Iyer*.

7. (1928) A I R 1928 Nag 111 (111) : 106 Ind Cas 333, *Ronya v. Daliram*.

the time of the sale, is sold, the sale is not a *nullity* so far as the purchaser is concerned. Hence, an application by the purchaser to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property is governed by this Article.¹ Where the purchaser is the decree-holder himself and he does not apply to set aside the sale within the period prescribed by this Article, he cannot thereafter ignore the sale and apply again for execution of the decree as if the prior sale was a nullity.² But, where property belonging to *A* (who is a party to the suit) is sold in execution of the decree against *B*, and *A* applies under Section 47 of the Civil Procedure Code for relief in respect of such sale, his application is not one to set aside the sale but is one to declare it void and not binding on him and hence is not governed by this Article.³

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9. Sale in insolvency proceedings—Applicability of Article.
—There is a conflict of decisions as to the applicability of this Article to an application to set aside a sale in insolvency proceedings. In the undermentioned case,¹ it was held by the Nagpur Judicial Commissioner's Court that the provisions of Order 21 are applicable to such sales and that, therefore, an application to set aside the sale being one under the Civil Procedure Code, this Article applies to such an application. But the Punjab Chief Court has taken a different view, its reason being that a sale in insolvency proceedings is not one "in execution of a decree" as contemplated by this Article.² It is submitted that the latter view is correct.

Note 8

- 1 (1935) A I R 1935 All 889 (891) 150 Ind Cas 389, *Gulzari Lal v. Sheo Charan Lal*.
- (1922) A I R 1922 Bom 205 (206) 46 Bom 833 67 Ind Cas 360, *Dalwant Ranganath v. Bala Malu*.
- (1923) A I R 1923 Cal 85 (88) 50 Cal 115 70 Ind Cas 606, *Mahar Ali v. Sarfaddin*.
- (1935) A I R 1935 Mad 340 (341) 159 Ind Cas 993, *Kesharan v. Bipathumma*.
- (1927) A I R 1927 Mad 835 (838) 101 Ind Cas 614, *Jagannadha Rao v. Basawayya*.
- (1927) A I R 1927 Mad 394 (395) 50 Mad 639 100 Ind Cas 522, *Muthu Kumarasami Pillai v. Muthusami Thevan*.
- (1930) A I R 1930 Oudh 148 (152) 124 Ind Cas 641 5 Luck 552 (F B), *Bhadur Singh v. Ram Pahal*.
- 2 (1936) A I R 1936 Pat 97 (99, 100, 101) 160 Ind Cas 1049 15 Pat 308 (F B), *Surendra Kumar v. Srichand Mahata*.
- (1935) A I R 1935 Mad 340 (341) 159 Ind Cas 993, *Kesharan v. Bipathumma*.
- (1927) A I R 1927 Mad 835 (837) 101 Ind Cas 614, *Jagannadha Rao v. Basawayya*.
- (1927) A I R 1927 Mad 394 (395) 50 Mad 639 100 Ind Cas 522, *Muthu Kumarasami Pillai v. Muthusami Thevan*.
3. (1938) A I R 1938 Cal 113 (115, 116) 1 I L R (1938) 1 Cal 280, *Nirode Kaly Roy v. Harendra Nath*.

Note 9

- 1 (1927) A I R 1927 Nag 262 (263) 102 Ind Cas 543, *Balaji v. Gopal Mali* (Following A I R 1921 Nag 25.)
2. (1914) A I R 1914 Lah 209 (209) 23 Ind Cas 397, *Afzal Ali v. Amar Ali*.

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10. Applicability of Article to application to set aside sale under Section 173 of the Bengal Tenancy Act.—There is also a conflict of decisions as to the applicability of the Article to an application under Section 173 of the Bengal Tenancy Act to set aside a sale. According to the High Court of Calcutta, such an application is "cognizable under Section 47" of the Civil Procedure Code and is therefore governed by this Article.¹ According to the High Court of Patna, on the other hand, such an application is not one under the Civil Procedure Code and is therefore not governed by this Article.²

11. Parties to application to set aside sale — Effect of joining them after limitation.—There is a conflict of decisions as to whether an application to set aside a sale in which the auction-purchaser or the decree-holder is not joined as a party within the period of thirty days from the date of the sale but is so joined *afterwards*, is barred by limitation. According to one view, the decree-holder and the auction-purchaser are *necessary* parties to an application to set aside an execution sale and so, where either of them is not joined as party to the application till after the expiry of period of limitation, the application is barred.¹ But, according to the other view, the law only requires that *notice* should be given to the parties affected by an application to set aside a sale and it is not necessary that they must be joined as *parties* to the application.² (See Order 21 Rule 92 Proviso) It is submitted that the latter

Note 10

1. (1925) A I R 1925 Cal 351 (352) 51 Cal 1014 : 82 Ind Cas 322, *Haripada Haldar v. Baradaprosad*. (Following 24 Cal 707.)
2. (1927) A I R 1927 Pat 177 (177, 178) : 6 Pat 366 : 101 Ind Cas 564, *Ananta Charan Padhan v. Nmmas Bahubalendra*. (Case relating to application under S. 227 of the Orissa Tenancy Act which corresponds to S. 173 of Bengal Tenancy Act. Dissenting from A I R 1925 Cal 351 cited above.)
- (1916) A I R 1916 Pat 30 (30) : 38 Ind Cas 209, *Chandramma Roy v. Maharaja of Dumraon*.

Note 11

1. (1891) 1891 All W N 121 (121), *Karamat Khan v. Mir Ali Ahmed*. (1893) 15 All 407 (409) : 1893 All W N 173, *Ali Gauhar Khan v. Bansidhar*. (1919) A I R 1919 Cal 510 (510) : 50 Ind Cas 5, *Ajuddin Ahmed v. Khoda Bux*.
- (1928) A I R 1928 Cal 189 (190) : 107 Ind Cas 733, *Satish Chandra v. Rakhal Chandra*.
- (1919) 37 Mad L Jour 25 (26) (N R C).
- (1930) A I R 1930 Pat 318 (318) : 9 Pat 310 : 125 Ind Cas 570, *Rameshwar Singh v. Mongal Prasad*.
- (1921) A I R 1921 Pat 498 (498) : 62 Ind Cas 61, *Mt. Sumitra Kuer v. Damri Lal*.
- (1929) A I R 1929 All 593 (593) : 119 Ind Cas 103 : 51 All 910, *Dipchand v. Sheo Prasad*.
- (1935) A I R 1935 Cal 503 (503, 503) : 62 Cal 286 : 157 Ind Cas 637, *Radha Kisson Mahesri v. Tansuk Mahesri*.
- (1923) A I R 1923 Cal 394 (396) : 82 Ind Cas 776, *Rajchandra Das v. Kalakanta Das*.
- (1897) 1897 Pun Re No. 3, *Sewak Ram v. Kundan Lal*.
- (1923) A I R 1923 Lah 413 (414) : 107 Ind Cas 494, *Kirpa Ram v. Nand Lal*.
- (1923) A I R 1923 Lah 414 (417) : 108 Ind Cas 391, *Manigir v. Hazarjir*.

view is correct. There does not seem to be any provision in the Code for naming parties in applications.

See also the undermentioned cases.³

12. Notice to persons affected by application to set aside sale—Limitation.—Under the proviso to Order 21 Rule 92 sub-rule 2 of the Civil Procedure Code, no order setting aside a sale in execution of a decree shall be made unless notice of the application to set aside the sale has been given to all persons affected thereby. The period of limitation prescribed by this Article only refers to an application to set aside a sale and does not refer to the notice abovementioned. Hence, where an application to set aside a sale has been made within the period of thirty days from the date of the sale, the sale may be set aside although the notice required by the above provision is given *after* the expiry of such period.¹

13. Application by notice of motion, when deemed as made.
— See Note 3 to Article 183 *infra*.

14. Suit to avoid sale treated as proceeding under Section 47, Civil Procedure Code—Limitation.—Where a *suit* to avoid a sale is treated as a proceeding under Section 47 of the Code of Civil

(1914) A I R 1914 Oudh 307 (307, 308) : 17 Oudh Cas 306 : 25 Ind Cas 907, *Ghazanfar Husain v. Ram Rattan*.

(1933) 143 Ind Cas 552 (555) (FB) (Cochin), *Aniha Alias v. Ananthasankara Ayyar*.

(1932) A I R 1932 Pat 255 (256) 11 Pat 504 139 Ind Cas 810, *Nitar Dutta v. Bishun Lal Sao*

(1930) A I R 1930 All 167 (168) 124 Ind Cas 23, *Jai Singh v. Daulatya Tamta* (A judgment-debtor making an application to set aside a sale under O 21 R 89 need not show the name of the auction-purchaser in the array of parties)

[See (1924) A I R 1924 Pat 37 (38) 2 Pat 800 75 Ind Cas 430, *Mt Zainab Bibi v. Paras Nath*]

3 (1932) A I R 1932 Cal 733 (733) 140 Ind Cas 446, *Sailabala Dass v. Kalipada Banerjee* (An application to set aside sale in execution

Note 12

1. (1924) A I R 1924 Pat 37 (37, 38) 2 Pat 800 75 Ind Cas 430, *Mt Zainab v. Paras Nath*

(1926) A I R 1926 Pat 266 (267) 94 Ind Cas 31, *Ishwardas Marwari v. Diveswar Lal*

(1928) A I R 1928 Lah 413 (414) 107 Ind Cas 494, *Kirpa Ram v. Nand Lal*

(1922) A I R 1922 Oudh 129 (130) 69 Ind Cas 238, *Abdur Rahman v. Har Narayan*

(1918) 19 Ind Cas 475 (476) 37 Bom 387, *Ganesh Bab Naik v. Vithal Vaman Mahalya*

(1929) A I R 1929 Mad 763 (764) 52 Mad 861 121 Ind Cas 835, *Narayana Sahu v. Petamma*

(1932) A I R 1932 Pat 255 (256) 11 Pat 504 139 Ind Cas 810, *Nitar Dutta v. Bishun Lal Sao*

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Procedure, the period of limitation applicable is that applicable to an *application* under Section 47¹ and the application must be deemed, for purposes of limitation, to have been filed on the day on which the *suit* was instituted.²

15. Setting aside of sale under inherent power—Limitation.—As seen in Note 28 to Section 3 *ante*, the law of limitation does not apply to what the Court does in the exercise of its *inherent* power. Hence, where the Court has inherent power to set aside a sale, this Article does not apply and the Court can set aside the sale in the exercise of such power although the period of limitation under this Article may have expired.¹

16. Fresh ground for setting aside sale, if can be urged after limitation.—Where an application to set aside a sale is made in time, new grounds of objection to the sale cannot be urged for the first time after the expiry of the period of limitation for filing an application to set aside the sale.¹ The reason is that the preferring of such objections must be treated as a *fresh application*. But, where any grounds have been already raised in the original application, further particulars of such grounds can be given after the expiry of the period of limitation under this Article.²

17. Extension of time under this Article.—The period of limitation fixed by this Article cannot be enlarged except under the express provisions of the Act.¹ The Court has no power to extend such

Note 14

1

(1921) A I R 1921 Bom 285 (288, 289) : 45 Bom 174 : 58 Ind Cas 231, *Bhaichand Kirparam v. Ranchhodas Manchharam*. (Do.)

(1927) A I R 1927 Cal 614 (615) : 54 Cal 419 : 103 Ind Cas 233, *Umapati Mukerjee v. Sheikh Soleman*.

(1900) 22 All 376 (377) : 1900 All W N 129, *Lalman Das v. Jagannath Singh*.

2. (1935) A I R 1935 Cal 15 (17) : 155 Ind Cas 848, *Protina Sundari Debi v. Sarada Charan Goho*.

Note 15

Chettiar v. Data Sahib. (Party guilty of laches—Inherent power cannot be exercised in his favour)]

Note 16

1. (1932) A I R 1932 Lah 576 (576) : 140 Ind Cas 715, *Vollart Brothers of Karachi v. Ghulam Hamdani*.

2. (1926) A I R 1926 All 305 (305, 306) : 92 Ind Cas 467 : 49 All 256, *Ram Saran Das v. Girdhari Lal*.

Note 17

1. (1925) A I R 1925 Cal 515 (516) : 78 Ind Cas 149, *Giribala Dasi v. Tara Nath Jatan*.

period.² Hence, the fact that the Court fixes a date beyond thirty days from the sale for hearing objections to the sale will not enable an application to set aside the sale being made after the expiry of the thirty days' period prescribed by this Article.³

Section 5 *ante* will only apply to an application to set aside a sale in execution where the Section has been made applicable to such application by or under any enactment for the time being in force. Hence, where the Section has not been so made applicable, the Court has no power under the Section to admit such an application after the period of thirty days prescribed by this Article.⁴

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- (1914) A I R 1914 Cal 723 (729) . 24 Ind Cas 249, *Jotindra Mohun v. Bro-jendra Kumar*.
- (1932) A I R 1932 Cal 381 (381) : 137 Ind Cas 378, *Surja Kanta Das v. Jogendra Nath Dutt*.
- (1919) A I R 1919 Lah 422 (422, 423) : 50 Ind Cas 610, *Asa Nand v. Jhangu Ram*.
- (1933) A I R 1933 Rang 8 (9) . 147 Ind Cas 130, *Maung Lat v. Maung Kyaw Tha*.
- (1925) A I R 1925 Rang 286 (286) . 6 Rang 490 : 113 Ind Cas 810, *Mahomed Cassim v. A J David*.
- (1926) A I R 1926 Lah 639 (640) . 96 Ind Cas 377, *Muhammad Din v. Sharanpat*.
- (1917) A I R 1917 Pat 314 (314) . 39 Ind Cas 664, *Rameshwar Misser v. Sureshwar Misser*.
- (1896) 1 Cal WN 67 (70), *Kailash Chandra Halder v. Bissonath Paramanac*.
- (1918) A I R 1918 Cal 77 (78) : 48 Ind Cas 970, *Abha Munshi v. Komu Molla*.
[See (1907) 1907 Pun Re No. 92, *Girdhari Lal v. Bhago*]
2. (1934) A I R 1934 Lah 875 (876) : 155 Ind Cas 603, *Buti Ram v. Sardar Singh* (Time cannot be extended under S 148, C. P. C.)
- (1911) 10 Ind Cas 148 (152) (Cal), *Bibi Sharofan v. Mahomed Habibuddin*. (Do)
- (1934) A I R 1934 Pesh 25 (26) . 148 Ind Cas 1082, *Bhagchand v. Mt Najab Sultan* (Do)
- (1935) A I R 1935 Rang 466 (471) . 13 Rang 595 . 159 Ind Cas 945, *K. P. L. S S Chettiar v. Official Receiver, Ramnad* (Inherent power of the Court cannot be invoked to override the time prescribed by the Limitation Act)
- (1924) A I R 1924 All 668 (669) . 46 All 631 . 79 Ind Cas 997, *Tota Ram v. Panna Lal* (Do)
[See (1929) A I R 1929 All 485 (492) . 121 Ind Cas 552, *Baldeo Prasad v. Sakhdeo Prasad*. (Do)]
- (1917) A I R 1917 Mad 176 (177) . 33 Ind Cas 996, *Vanniasami Thevar v. Periyasami Thevar* (Court has no inherent power to extend the period for depositing the amount under O 21 R 89, C. P. C.)
3. (1920) A I R 1920 Lah 71 (71) . 57 Ind Cas 224, *Genda Mal v. Munshi Ram*.
4. (1934) A I R 1934 All 814 (314) . 151 Ind Cas 244, *Narotam Das v. Bhagwan Das*
- (1911) 10 Ind Cas 148 (152) (Cal), *Bibi Sharofan v. Mahomed Habibuddin*.
- (1919) A I R 1919 Lah 422 (422) . 50 Ind Cas 610, *Asa Nand v. Jhangu Ram*
- (1919) A I R 1919 Lah 152 (154) . 51 Ind Cas 447, *Bashi Ram v. Hassan Muhammad*
- (1925) A I R 1925 Oudh 411 (412) . 67 Ind Cas 722, *Ram Aular v. Sheo Piarey Lal*.
- (1934) A I R 1934 Pesh 25 (26) . 148 Ind Cas 1082, *Bhag Chand v. Mt. Najab Sultan*.

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As Section 6 *ante* only applies to suits and applications for execution, it does not apply to an application to set aside a sale in execution and hence, the minority or other disability of the applicant will not affect the period of limitation for such an application.⁵ Under the Act of 1877 the law was different on this point. Section 7 of that Act (which corresponded to Section 6 of the present Act) applied to all applications and not only to applications for execution and hence, it was held that the minority or other disability of the applicant was a ground for extending under that Section the period of limitation for an application to set aside a sale.⁶

The time occupied in obtaining a copy of the report of the sale officer cannot be excluded in computing the period of limitation under the Article.⁷ The reason is that Section 12 *ante* which provides for the exclusion of time requisite for obtaining copies in certain cases does not apply to a proceeding to set aside an execution sale.

Section 13 *ante* which provides for the exclusion of the time during which the defendant has been absent from British India applies only to *suits* and hence does not apply to an *application* to set aside a sale.⁸

Under clause 2 of Section 14, *ante*, the applicant will be entitled to the exclusion of the time occupied by a prior application by him to set aside the sale, where such application has been prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. Where, however, there has not been a *bona fide* mistake of jurisdiction on the part of the applicant,⁹ or where the prior application has not been made to a Court,¹⁰ he will not be entitled to any exclusion of time under the Section.

Where the period of limitation prescribed by this Article expires on a day when the Court is closed, the application may be made,

5. (1935) A I R 1935 Pat 450 (450) : 159 Ind Cas 253, *Bholanath v. Mt. Sayedatunnissa Begum*.

6. (1911) 11 Ind Cas 401 (402) (Cal), *Fazil Karim v. Ananda Mohan*.
(1887) 9 All 411 (413) : 1887 All W N 58, *Baldeo Singh v. Kishon Lal*.
(1910) 6 Ind Cas 488 (489) (Lah), *Gujjar Mal v. Sita Ram*.

[See (1900) 1 Ind Cas 170 (170) : 1 All W N 170, *Hardev Singh v. Jethi*.]

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7. (1929) A I R 1929 All 593 (596) : 51 All 910 : 119 Ind Cas 103, *Dipchand v. Sheo Prasad*.

8. (1880) 8 All 185 (186), *Ahsan Khan v. Ganga Ram*.

9. (1899) 23 Bom 531 (535) : 1 Bom L R 83, *Narayan v. Nasul Khan*. (Application to Collector to set aside sale—Second application to Civil Court after limitation)

10 See (1920) A I R 1920 Bom 130 (130) : 44 Bom 50 : 54 Ind Cas 670, *Tiran-Collector or Court*.
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under Section 4 *ante*, on the day on which the Court re-opens.¹¹

See also Note 18 below.

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18. Computation of limitation under the Article — Effect of fraud. — By virtue of Section 18 *ante*, where an applicant for setting aside a sale has been kept from the knowledge of his right to apply by the fraud of the opposite party, he will be entitled to have the period of limitation reckoned from the date when he became aware of the fraud.¹ In order to claim the benefit of Section 18, two factors are necessary :

- (1) there must be fraud by the opposite party,² and
- (2) such fraud must have resulted in the applicant being kept from the knowledge of his right to apply.³

Hence, the mere fact that the applicant was unaware of the sale proceedings is not sufficient to attract the provisions of Section 18. It must be established that such ignorance on his part was brought about by the fraud of the opposite party.⁴ Conversely, the fact that

- 11 (1938) A I R 1938 Bom 209 (200, 210) 175 Ind Cas 221, *Vecrappa Channappa v. Iratappa Malagi*
 (1933) A I R 1933 Cal 886 (986) 60 Cal 1106 . 147 Ind Cas 797, *Jnanendra-kumar v. Amritakrishna Datta*
 [See also (1903) 6 Oudh Cas 68 (70), *Ram Nath v. Murlidhar*. (Deposit under Order 21 Rule 89 made on re-opening day is sufficient)
 (1922) A I R 1922 All 195 (196) . 67 Ind Cas 321, *Durga Prasad v. Babu Lal*. (Do)
 (1906) 9 Oudh Cas 214 (215), *Radhe Lal v. Sheo Prasad*. (Do.)
 (1896) 19 All 140 (140) 1897 All W N 7, *Bashir-ud-din v. Jhora Singh* (Do)]

Note 18

1. (1923) A I R 1923 All 282 (283, 284) 45 All 316 71 Ind Cas 631, *Sheo Ram Kocri v. Ikramunnisa Bibi*
 (1914) A I R 1914 Lah 209 (209) 23 Ind Cas 397, *Ajmal Ali v. Aman Ali*
 (1916) A I R 1916 All 184 (185) . 35 Ind Cas 473, *Nasir Husain v. Kanhaiya Lal*
 (1899) 26 Cal 539 (545) 3 Cal W N 403, *Hira Lal Ghose v. Chandra Kanto Ghose*
 (1924) 28 Cal W N 56 (56) (S N)
 (1929) A I R 1929 Nag 305 (310) 116 Ind Cas 65, *Sunderabai v. Bapuna*.
2. (1919) A I R 1919 Lah 152 (154) 51 Ind Cas 447, *Bashir Ram v. Hassan Muhammad*
 (1922) A I R 1922 Pat 507 (510) 77 Ind Cas 957 2 Pat 65, *Ramdhuri Chowdhuri v. Deonandhan Prasad Singh*
 (1896) 1 Cal W N 67 (70), *Kailash Chandra Haldar v. Bissonath Paramanick*
 (1932) A I R 1932 Cal 627 (629) 140 Ind Cas 732, *Galstaun v. Mahammad Husain*
3. (1921) A I R 1921 Pat 145 (147) 61 Ind Cas 623, *Babu Das Narayan Singh v. Muhammad Yusuf*
 (1929) A I R 1929 Rang 62 (63) 7 Rang 104 117 Ind Cas 63, *Doutrammah v. A. N. J. N. Chettiar*
 (1911) 11 Ind Cas 433 (442) (Cal), *Rudrananda Thakur v. Prithi Chand Lal*
 (1912) 16 Ind Cas 464 (465) (Cal), *Narayan Sahu v. Damodar Das*
4. (1925) A I R 1925 Cal 515 (516) . 78 Ind Cas 149, *Giribala Das v. Taral Nath*.

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the opposite party has been guilty of fraudulent conduct is not sufficient to extend the period of limitation for the application. The fraud must have resulted in the applicant being kept in ignorance of his right to apply. Thus, the fact that the opposite party has, by fraud, induced the applicant not to apply within the period of limitation is not sufficient to extend limitation under the Section.⁵

Where an execution sale is sought to be set aside on the ground of fraud in the course of the execution proceedings leading up to the sale, and such fraud also has resulted in the applicant being kept from the knowledge of his right to apply, it is not necessary to prove any *independent* fraud in order to entitle the applicant to an extension of limitation. In other words, fraud antecedent to the sale may also be a ground for the extension of limitation, if by such fraud the applicant has been kept from the knowledge of his right to apply.⁶ A contrary view, however, has been taken in certain decisions⁷ in which it has been held that in order to entitle an applicant to an extension of limitation on the ground of fraud, the fraud must be one committed *after* the sale and not merely one committed in bringing about the sale. It is submitted that such a view is not correct. There is no reason, on the wording of Section 18, to restrict the fraud contemplated by that Section to fraud committed after the accrual of the cause of action. In fact, as seen in Note 2 to Section 18, it would be violating the provisions of Section 9 to hold that where there is no fraud sufficient to extend the period of limitation at the time of the accrual of the cause of action and consequently limitation begins to run, the occurrence of fraud *subsequently* will stop the running of limitation.

Where the applicant has been kept in ignorance of his right to apply by the fraud of the opposite party, the applicant is entitled to have limitation computed from the time when he comes to know of

5. (1918) A I R 1918 All 336 (337) : 43 Ind Cas 671, *Harish Chander v. Gunga Bishun*.

6. (1924) A I R 1924 Pat 496 (497) : 80 Ind Cas 761, *Thakur Mahton v. Jhaman Mahton*.

(1915) A I R 1915 Cal 268 (271) : 27 Ind Cas 294, *Arjun Das v. Gunendra Nath*.

Lu v. Damodar Das.

v. Mulund Lal Dutt.

Cas 555, *Nabin Chandra v.*

(1925) A I R 1925 Pat 521 (522) : 85 Ind Cas 622, *Bojrang Prasad Singh v. Mt. Sonejhari Kuer*.

(1921) A I R 1921 Cal 251 (252) : 48 Cal 119 : 60 Ind Cas 801, *Bhusan Mani Dasi v. Profulla Kristo Deb*.

(1923) A I R 1923 Mad 353 (354) : 72 Ind Cas 46, *Sheikh Muhammad Rowther v. Subba Naicker*.

[See (1927) A I R 1927 Cal 633 (636) : 101 Ind Cas 199, *Maharaj Bahadur Singh v. Karani Mai*. (Willful suppression of sale notices—Fraud keeping knowledge of right to apply from applicant may be inferred.)]

7. (1896) 1 Cal WN 67 (70), *Kailash Chandra Halder v. Bissonath Paramanic*.

(1920) A I R 1920 Pat 725 (725, 726), 57 Ind Cas 401, *Jagdish Misir v. Dhorai Khatwa*.

the fraud. Hence, where there has been such fraud, it is necessary to find when the applicant became aware of his right to apply so as to determine whether his application is within the period of limitation computed from the time of his becoming so aware.⁸ Where an applicant is entitled to an extension of time on the ground of fraud, his right will not be affected by the fact that the sale has been confirmed before he makes his application.⁹

Under Section 18, time is extended only as against the party guilty of the fraud. Hence, the question has arisen whether the fraud of the decree-holder or the auction-purchaser alone will be sufficient to extend the period of limitation for an application to set aside a sale. On this question there is a conflict of decisions. The views expressed may be summarised as follows :—

1. The fraud of the decree-holder alone will be sufficient.¹⁰
2. The fraud of the decree-holder alone will not be sufficient and unless the auction-purchaser also is guilty of fraud, there can be no extension of limitation.¹¹
3. The fraud of the auction-purchaser alone is sufficient.¹²
4. The fraud of the auction-purchaser alone is not sufficient and unless the decree-holder also has been guilty of fraud, time cannot be extended.¹³

Where an application to set aside a sale is *prima facie* barred by limitation, and the applicant claims an extension of limitation under Section 18, the burden is, to begin with, on the applicant to prove that he was, by the fraud of the opposite party, kept from the knowledge of his right to apply.¹⁴ But, when once such fraud is

8 (1918) A I R 1918 Cal 77 (78) 48 Ind Cas 970, *Abha Munshi v. Komu Mollah*

9 (1928) 112 Ind Cas 847 (847) (Lab), *Mt Jannat v Abdul Rahman*

(1937) I L R (1937) 2 Cal 496 (500), *Charles de Sa Fragoso v Meher Ali*

(1923) A I R 1923 All 282 (283) 45 All 316 71 Ind Cas 631, *Sheo Ram Koeri v Ikramunnissa Bibi*

(1912) 16 Ind Cas 436 (436) (Cal), *Nalmon Singh v Brinda Dasya*.

(1922) A I R 1922 Pat 422 (423) . 70 Ind Cas 675, *Ram Pershad Lal v. Chamari Singh*.

[But see (1887) 14 Cal 679 (681), *Gobind Chundra Majumdar v. Uma Charan Sen*]

10 (1928) 54 Mad L Jour 24 (24) (N B C)

(1927) 99 Ind Cas 946 (947) (Cal), *Kedar Hura v Asutosh Foy*.

(1934) A I R 1934 All 255 (258) 55 All 618 147 Ind Cas 1114 (F B), *Mt. Balkesha Kunuar v Harakh Chand*

11. (1916) A I R 1916 Mad 83 (38) 38 Mad 1070 29 Ind Cas 314, *Payidanna v Lakshminarasamma*

(1936) A I R 1936 Cal 706 (707) 166 Ind Cas 127, *Majaharal v. Mafi Jaddi*

1 Cas 347, *Parthasarathy v. Ahindra*

56 Mad 734 145 Ind Cas 388, *Pulla*

13 (1925) A I R 1925 Cal 1227 (1228) 86 Ind Cas 745, *Anzannessa v. Dwarsika Prosad Borol*

14 (1909) 2 Ind Cas 844 (845) 36 Cal 654, *Purna Chandra Mandal v. Anukul Biswas*

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established, the burden is shifted to the opposite party to show that the applicant became aware of the fraud more than thirty days before the date of his application.¹⁵

19. Defence not barred. — It is a general principle that limitation does not bar a *defence*. See Note 15 to Section 3 *ante*. Hence, where the judgment-debtor continues to be in possession of the property sold, he can resist a suit for possession by the purchaser on the ground that the sale is voidable by him (the judgment-debtor), although he has not applied within the period of limitation under this Article, to set aside the sale.¹

20. Special or local law, period prescribed by. — Under Section 29 sub-section 2 *ante*, where for any suit, appeal or application, a special or local law prescribes a period of limitation different from that prescribed by the First Schedule to this Act, the period prescribed by the special or local law must apply. Accordingly, it was held in the undermentioned case¹ that the application to avoid the sale was barred under Section 231 of the Chota Nagpur Tenancy Act, although the application was not barred under this Article.

15. (1928) A I R 1928 Cal 349 (350) : 108 Ind Cas 33, *Ramesh Chandra v. Biraj-sundari Gupta*.
 (1918) A I R 1918 Cal 171 (173) : 46 Ind Cas 221, *Ilam Kinkar Tewari v. Shri Ram*.
 (1924) A I R 1924 Pat 496 (497) : 80 Ind Cas 761, *Thakur Mahton v. Jha-man Mahton*.
 (1915) A I R 1915 Cal 268 (271) : 27 Ind Cas 294, *Arjun Das v. Gunendra Nath*.
 (1933) A I R 1933 Cal 339 (340) : 143 Ind Cas 281, *Ramuzaddin Basar v. Nimaddi Basar*.
 (1927) A I R 1927 Cal 633 (636) : 104 Ind Cas 199, *Maharaj Bahadur Singh v. Karan Mai*.
 (1925) A I R 1925 Pat 521 (522) : 85 Ind Cas 622, *Bajrang Prasad v. Mt. Sonejharu Kuer*.
 (1929) A I R 1929 Pat 228 (229) : 117 Ind Cas 46, *Dabu Lal v. Parem Kumari*.
 (1912) 16 Ind Cas 464 (465) (Cal), *Narayan Sahu v. Damodar Das*.
 (1926) A I R 1926 Cal 229 (231) : 87 Ind Cas 555, *Nabin Chandra Haldar v. Bipin Chandra Haldar*. (17 Bom 341, Followed)
 (1928) 112 Ind Cas 847 (848) (Lab), *Mt. Jannat v. Abdul Rahman Khan*.

Note 19

1. (1926) A I R 1926 Bom 33 (34) : 91 Ind Cas 426, *Dharmappa v. Venkappa*. (Defendant can contend that the sale was brought about by fraud)

[But see (1925) A I R 1925 Cal 81 (82) : 78 Ind Cas 126, *Jageswar Sukdar v. Kailash Mandal*. (Order confirming the sale amounts to a judicial determination that none of the objections exist upon which the validity of the sale could have been questioned)]

Note 20

1. (1916) A I R 1916 Pat 49 (50) : 37 Ind Cas 633, *Nalmoni Goussami v. Roban Majhi*.

21. Starting point of limitation. — The starting point of limitation under the Article is the date of the sale and not that of the confirmation of the sale.¹

A sale in execution of a decree is not complete until the acceptance of the bid by the competent authority — the sale does not become complete merely on the highest bid being made.²

There is a difference of opinion as to whether acceptance by the Court of the highest bid is necessary to complete the sale, or whether acceptance of such bid by the officer conducting the sale is sufficient for the purpose. According to one view, a sale is not complete till the highest bid has been accepted by the Court,³ while according to another view, the acceptance of the bid by the officer conducting the sale is sufficient to complete the sale.⁴

Again, according to certain decisions, the deposit of twenty-five per cent. of the purchase-money under Order 21 Rule 84 of the Civil Procedure Code is necessary to complete the sale,⁵ while such

Note 21

1. (1936) A I R 1936 Pat 553 (559) 167 Ind Cas 225, *Chuni Lal v. Ram Ran-
ajoy Prasad*
- (1902) 29 Cal 626 (628) 6 Cal W N 776, *Chowdhry Keshri Sahay v. Giani
Roy* (Case under Section 310 A of the Civil Procedure Code of 1882)
- (1887) 14 Cal 614 (617), *Kishori Mohun Roy v. Chunder Nath Pal* (Meaning
of "sale" in Article 138 of Act of 1877.)
- (1912) 17 Ind Cas 884 (884) 8 Nag L R 177, *Wasudeo v. Hiralal*.
- (1924) A I R 1924 Nag 108 (109) 19 Nag L R 162 78 Ind Cas 47, *Sitaram
v. Asaram*.
2. (1912) 17 Ind Cas 783 (784) 35 All 65, *Munshi Lal v. Ram Narayan*
- (1930) A I R 1930 Lah 41 (42) 118 I C 900, *Abdulla Khan v. Ganpat Rai*.
- (1928) A I R 1928 Nag 111 (112) 106 Ind Cas 333, *Romya v. Baliram*
- (1938) 1938 Nag L Jour 10 (12), *Ramchandra v. Ajjun* (In case of an appli-
cation to set aside a sale held by the Collector, the time under Art 166
starts from the date when the bid is accepted by the Collector)
3. (1935) A I R 1935 Oudh 181 (192, 193) 153 Ind Cas 719 10 Luck 537,
Hari Shankar v. Mt. Amina Dibi
- (1932) A I R 1932 Lah 525 (525) 188 Ind Cas 86, *Jetha Mal v. Punjab &
Sindh Bank Ltd. Amritsar*
- (1931) A I R 1931 Oudh 291 (292) 182 Ind Cas 263, *Kanwal Ram v.
Mt. Gurdev*
- (1934) A I R 1934 Oudh 25 (27) 9 Luck 393 147 Ind Cas 1077, *Iqbal
Naram v. Rajkumar Dakhshi*
- (1923) A I R 1923 Pat 525 (527) 2 Pat 548 76 Ind Cas 113, *Jairbhadar Jha
v. Matukdhari*
4. (1931) A I R 1931 Lah 78 (78) 131 Ind Cas 227, *Nur Din v. Eulazai Mal &
Sons*
[See also (1933) A I R 1933 Nag 123 (124) 141 Ind Cas 367 29
Nag L R 52, *Mannulal v. Nankhelal*]
5. (1919) A I R 1919 Lah 309 (310) 50 Ind Cas 914, *Mt. Khairan v. Alliance
Bank of Simla*
- (1909) 1 Ind Cas 12 (12) (Lah), *Atma Singh v. Duni Chand* (When the
decree-holder himself is the auction purchaser and no deposit is made
by him, the date of the completion of the sale is that date on which
the executing Court, acting under the second part of Section 294 of
the Civil Procedure Code orders the purchase money to be set off
against the amount of decree)
- (1934) A I R 1934 Pesh 25 (27) 148 Ind Cas 1032, *Dhag Chand v. Mt.
Najab Sultan* (Do.)

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deposit is not necessary according to certain other decisions.⁶

But, payment of the full amount of the purchase money is not necessary for the completion of a sale in execution.⁷

22. Order setting aside sale subsequently reversed — Limitation for fresh application to set aside sale. — In the undermentioned case,¹ a sale was set aside after thirty days from the date of the sale on the application of one of the judgment-debtors. But, the order setting aside the sale was afterwards reversed in revision by the High Court and the sale was confirmed. Thereupon the other judgment-debtors applied to have the sale set aside. It was contended on their behalf that when the sale had been set aside the judgment-debtors ceased to have any cause of action to apply for setting aside the sale, and that the confirmation of the sale by the High Court gave them a fresh cause of action and that they were entitled to a period of thirty days from the date of such confirmation. In overruling the contention, a learned Judge of the Patna High Court observed as follows :

"I can well imagine a case in which before the expiry of the time for making an application for setting aside the sale it is set aside by the Court erroneously and thereby the party who is entitled to apply for setting it aside is unable to do so. If, afterwards, the sale which was erroneously set aside is affirmed, the party whose right was taken away by the Court may well claim that the period during which on account of the sale being non-existent he was prevented from making an application for setting it aside should be excluded, but, here, as I have said, the entire period expired before the sale was actually set aside."

Article 167

167.* Complain- ing of resistance or ob- struction to delivery of possession of immove- able property decreed or sold in execution of a decree.	Thirty days.	The date of the resistance or obstruction.
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* Act of 1877

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|---|---------------------|---|
| <p>6. (1924) A I R 1924 Nag 108 (109) : 19 Nag L R 162 : 78 Ind Cas 47, <i>Sitaram v. Asaram</i>.
 (1935) A I R 1935 Pesh 160 (161) : 159 I. C. 273, <i>Padam Lal v. Mohan Lal</i>.
 [See (1926) A I R 1926 Bom 375 (335) : 95 Ind Cas 549, <i>Vana Khushal Patil v. Ratilal Bhaidas</i>]</p> <p>7 (1919) A I R 1919 Lah 309 (310) : 50 Ind Cas 913, <i>Mt. Khairan v. Alliance Bank of Simla</i>. (Dissenting from 1 Ind Cas 12)</p> | <p>Thirty days.</p> | <p>The date of the
resistance, ob-
struction, or
dispossession.</p> |
|---|---------------------|---|

Note 22

- 1 (1936) A I R 1936 Pat 553 (559) : 167 Ind Cas 525, *Chuni Lal v. Ram Ran-
vijay Prasad Singh*.

Synopsis

Article 167
Notes
1—2

1. Legislative changes.
2. Starting point of limitation — Second obstruction.
3. Application beyond time — Conversion into a suit.
4. Minority and limitation.
5. Transfer of execution case to another Court and limitation for an application under Order 21 Rule 97.

1. Legislative changes.

1 In Articles 158 and 160 of the Act of 1871 (corresponding to the present Articles 165 and 167), the following cases alone were dealt with :—

- (i) Dispossession by a decree-holder (Article 158).
- (ii) Dispossession by an auction-purchaser (Article 160).
- (iii) Obstruction or resistance to the delivery of possession to the auction-purchaser (Article 160)

There was no provision for cases of obstruction or resistance to the delivery of possession to the *decree-holder*.

2. In the Act of 1877, Article 165 dealt with cases of dispossession by a decree-holder as well as by an auction-purchaser, and Article 167 dealt with the same two cases, and also with cases of obstruction or resistance to the delivery of possession to the *decree-holder* and to the auction-purchaser, so that Article 167 really included also the two cases dealt with by Article 165

3 The present Act has removed this redundancy by deleting from this Article the provision relating to dispossession and retaining only the provision relating to obstruction and resistance to the delivery of possession.¹

2. Starting point of limitation—Second obstruction.—Time, under this Article, runs from the date of “the resistance or obstruction.” Suppose now a decree-holder for possession or a purchaser of immovable property in an execution sale is resisted in the delivery of possession and possession is not consequently delivered to him and he applies again for delivery of possession and is again resisted and an application complaining of the latter resistance is made within

Act of 1871

160 —Complaining of resistance or obstruction to delivery of possession of immovable property sold in execution of a decree, or of dispossession in the delivery of possession to the purchaser of such property

Thirty days

The date of the resistance, obstruction, or dispossession.

Act of 1859

No corresponding provision

Article 167 — Note 1

1 See (1919) A I R 1919 Mad 269 (271) 42 Mad 753 53 Ind Cas 437 (F B), *Thattantaisila v. Kombi Aliasan*

Article 167
Notes
2—3.

thirty days thereof, what is the starting point of limitation for the application? It has been held generally that the starting point is the date of the *second obstruction*, the reason being that the resistance referred to in Column 3 of the Article is the same as that complained of in the first column.¹ It is immaterial that no application under Order 21 Rule 97 of the Civil Procedure Code was made on the first resistance,² or that the application was made and dismissed for default.³ According to the Bombay High Court, however, if the second obstruction is by the *same* person who made the first obstruction and in the same character, the starting point of limitation would be the date of the earlier resistance, the reason being that the second resistance is really not a fresh one.⁴

On the question whether on obstruction, a decree-holder or auction-purchaser is bound to apply for removal of the obstruction or whether he can apply again for possession, see the Authors' Commentaries on the Civil Procedure Code, Order 21 Rule 97, Notes 4 and 5 and the undermentioned cases.⁵

3. Application beyond time — Conversion into a suit. — If an application for the removal of obstruction is allowed to be converted

Note 2

1. (1891) 16 All 131 (132), *Devi v. ...*

L. v. Ray
— Same

obstructor.)

(1896) 18 All 233 (236) : 1896 All W N 84, *Naram Das v. Hazari Lal*.
(Obstructions by the same person.)

(1923) 1928 Mad W N 236 (236), *Ammu Kotilamma v. P. Manaklal*.
[See (1891) 1691 All W N 131 (132), *Budhan v. Faraz Ali*.]

2. (1921) A I R 1921 Mad 559 (561) : 66 Ind Cas 722, *Mayappa Chetty v. Meyappan Serrai*

(1882) 5 Mad 113 (114), *Ramasekhara v. Dharmaraya*. (Decree for possession.)

3. (1938) A I R 1938 Cal 352 (353) : 176 Ind Cas 816, *Surama Sundari Devi v. Kiranshaski Choudhrani*

4. (1933) A I R 1933 Bom 457 (459, 460) : 146 Ind Cas 11 (F B), *Mukund Bapu v. Tanu Sakhu*

Pillai.

(1879) 5 Cal 331 (332, 333) : 5 Ind Jur 136, *Shoteenath Mookerjee v. Obhoy Nund Roy*.

[See also (1884) 7 All 79 (91) :

v. Gohal Chand. (The

Code, says 'may apply,'

application is filed, it is

prescribed by Article 167.)

(1912) 16 Ind Cas 432 (432) (Mad), *Muthusamy Goundan v. Ethirajulu Naidu*.

(1933) A I R 1933 Nag 369 (370) : 147 Ind Cas 582, *Nathu Harishankar v. Fatusa*.

(1886) 10 Mad 53 (56) : 11 Ind Jur 19, *Srin v. Muthuswami*.]

into a suit, the law of limitation applicable is the law relating to suits.¹

Where an application under Order 21 Rule 97 of the Code of Civil Procedure has been made after the lapse of one month of the obstruction, the Court should not convert it into a suit and then dismiss the suit on the ground that the application was barred by time. The Court should dismiss the application itself as barred by time instead of converting the application into a suit and dismissing it, thereby making such dismissal a bar to a further suit.²

4. Minority and limitation. — See Note 13 to Section 6 *ante*, and the undermentioned case.¹

5. Transfer of execution case to another Court and limitation for an application under Order 21 Rule 97. — A decree-holder auction-purchaser applied to the Bombay High Court under Order 21 Rule 97 and also for further execution under Order 21 Rule 50 against a partner of the judgment-debtor firm. The Bombay High Court transferred the decree for execution to the Sind Court. The Sind Court held that the matter of the removal of the obstruction not being *in execution*, it did not have to deal with the application under Order 21 Rule 97. The decree-holder then made a fresh application under Order 21 Rule 97 to the Sind Court which was dismissed as barred. On appeal it was held that the application under Order 21 Rule 97 being by a decree-holder-auction-purchaser, the matter was one relating to execution and also that time for the said application should be computed from the date of the application to the Bombay High Court.¹

Article 167
Notes
3—5

168.* For the re-admission of an appeal dismissed for want of prosecution.	Thirty days.	The date of the dismissal.
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Article 163

Act of 1877, Article 168, Act of 1871, Article 161

Same as above.

Act of 1859

No corresponding provision.

Note 3

- (1892) 18 Bom 37 (40), *Namdev v. Ramchandra*.
(1885) 1885 Bom P J 163 (164), *Haribhai Gangadas v. Balaji Pandurang*
- (1910) 6 Ind Cas 285 (285) (Mad), *Valliamma v. Shanmugam Pillai*
[See also (1897) 21 Bom 392 (393), *Lola v. Narayan*]

Note 4

- (1897) 11 Bom 478 (474), *Vinayakrav Amrit v. Deirao Gound* (Application under Order 21 Rule 97 should be made within one month of attainment of majority.)

Note 5

- (1936) A I R 1936 Sind 11 (13) . 161 Ind Cas 524 . 80 Sind L R 290, *British India Steam Navigation Co. Ltd. v. A. M. Sivanjee & Co.*

Article 168
Notes
1—2

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Dismissed for want of prosecution."
 4. Application to restore appeal rejected under Order 41 Rule 10.
 5. Application to restore appeal rejected for non-payment of court-fee.
 6. Dismissal without jurisdiction.
7. Application made in time — Party impleaded afterwards — Effect.
8. Starting point.
 9. Court cannot extend time prescribed by this Article.
 10. Rangoon High Court Rules of Procedure, Rule 9, sub-rule 2.

Other Topics

Application for re-admission of appeal	See Note 2, Pt. 2, Note 3, Pts. 1, 2
'Rejection' of appeal is not 'dismissal'	... .. See Note 4
Section 5 and this Article	... .. See Note 9, Pt. 4
Section 6 is not applicable	... .. See Note 8, Pt. 2

1. Legislative changes.

1. There was no provision corresponding to this Article in the Act of 1859. Section 347 of the Civil Procedure Code, 1859, however, contained a provision that an application for re-admission of an appeal dismissed for want of prosecution may be made within thirty days of the date of dismissal.¹

2. Article 161 of the Act of 1871 introduced the provision corresponding to the present Article.

2. **Scope of the Article.** — This Article applies to an application for the re-admission of an appeal dismissed for want of prosecution. It has been held that the application referred to is one under the *Code of Civil Procedure*¹ and that the Article has no application to

Article 168 — Note 1

- 1 (1867) 8 Suth W R 361 (361, 362), *Shashk Mittoo Khan v. Ruhmun Khan*.
 (1868) 10 Suth W R 437 (437), *Tarkalee Dabee v. Nitya Moyee Dabia*.
 (1868) 10 Suth W R 450 (451) : 2 Beng L R A O 110, *Tara Chand Ghose v. Anand Chundra Choudhry*.
 (1868) 10 Suth W R 450 (451), *Al Khan Hameed Khan v. Feroze* (The time

Note 2

1. (1930) A I R 1930 Rang 223 (231, 233) : 8 Rang 380 : 127 Ind Cas 161 (F B).
Abdul Ganny v. Mrs. I. M. Russell.

applications for re-admission under the Rules of the High Court.² Again, a Court can restore, under its *inherent* powers, an appeal which has been rejected or dismissed in cases not covered by a specific provision of law.³ An application by a party in such cases invoking the Court's inherent powers for restoration of such appeal is not governed by any period of limitation.⁴ The Article only applies to a dismissal for *default of prosecution* and not to an application to set aside a compromise decree in appeal on the ground of fraud.⁵

3. "Dismissed for want of prosecution." — Order 41 Rule 19 of the Code of Civil Procedure provides for an application for the re-admission of an appeal dismissed :—

1. under Order 41 Rule 11 sub-rule 2, where, without sending notice to the respondent, the Court fixes a day for hearing the appellant and he fails to appear on such date, or
2. under Order 41 Rule 17, where, after notice to the respondent, the Court fixes a day for hearing and the appellant fails to appear on that day, or
3. under Order 41 Rule 18, where, on the day fixed for hearing it is found that notice has not been served on the respondent in consequence of the default of the appellant in paying the costs of process.

The dismissal in each of the above cases is clearly a dismissal "for want of prosecution" within the meaning of this Article and the application for re-admission in such cases would be governed by this Article.¹ But the Article is not necessarily confined to applications

2 (1895) 23 Cal 399 (346, 347), *Ramhari Sahu v. Madan Mohan Mitter* (This case was overruled in 24 Cal 350 in so far as it decided that the dismissal could be set aside under the Rules of the Court, but did not affect the decision so far as it held that limitation will not apply to applications under Rules of Court.)

(1921) A I R 1921 Cal 67 (70) 48 Cal 817 : 66 Ind Cas 209, *Narendra Lal Khan v. Tarubala Dass*;
[See also (1908) 82 Bom 1 (6) 9 Bom L R 503, *Wadia Gandhi & Co. v. Purshottam Swaji*]]

3. (1937) A I R 1937 Oudh 426 (426, 427) 170 Ind Cas 155. 13 Luck 425, *Firm Anant Ram Mangat Ram v. Firm Ram Sarup*
(1886) 8 All 315 (319) 13 Ind App 57 4 Sar 707 (P C), *Baluant Singh v. Daulat Singh*
(1920) A I R 1920 All 112 (114) 42 All 626 60 Ind Cas 81, *Sundar v. Habib Chik*

4. See Note 28 to Section 8, *ante*

[See also (1921) A I R 1921 Cal 67 (70) : 48 Cal 817 66 Ind Cas 209, *Narendra Lal Khan v. Tarubala Dass*;
(1921) A I R 1921 Bom 20 (20, 22) 45 Bom 648 60 Ind Cas 919, *Sonubai Daburao v. Shitajirao Krishnarao*]

[But see (1937) A I R 1937 Oudh 426 (427) 170 Ind Cas 155 13 Luck 425, *Firm Anant Ram Mangat Ram v. Firm Ram Sarup*]

5. (1915) A I R 1915 Cal 622 (623) 27 Ind Cas 628, *Peary Chowdhry v. Sonoory Dass*

Note 3

1. (1921) A I R 1921 Bom 20 (20, 22) 45 Bom 649 60 Ind Cas 919, *Sonubai v. Shitajirao Krishnarao*

Article 168
Notes
3—4

under Order 41 Rule 19. A striking off of an appeal, for instance, *before* the date fixed for hearing, for default of payment of process fees is not a dismissal under Rule 18 of Order 41 and an application to re-admit such appeal is not one under Order 41 Rule 19. Under Rule 9 of the Appellate Side Rules of the Rangoon High Court, however, an application will lie for such re-admission and it has been held that the application must be regarded as one under the Code of Civil Procedure. Article 168 will apply to such an application also.²

4. Application to restore appeal rejected under Order 41 Rule 10. — Can a Court restore an appeal which has been rejected under Order 41 Rule 10 for failure to furnish security for costs? If so, what is the Article applicable to such cases? ¹ It has been held in the undermentioned case² that Section 107 read with Order 25 Rule 2 of the Civil Procedure Code empowers the Appellate Court to set aside the rejection of an appeal under Order 41 Rule 10 and that application for that purpose would be governed by this Article. If an application does lie under Section 107 read with Order 25 Rule 2, it may be conceded that this Article will apply to such an application. But it is submitted that an application will not lie under Section 107 and Order 25 Rule 2 of the Code, to set aside a rejection of an appeal under Order 41 Rule 10. Order 25 Rule 2 refers to the *dismissal* of suits and Order 41 Rule 10 refers to a *rejection* of an appeal. The Code uses the word "rejection" in a sense different from that of "dismissal," and a Rule which applies to a *dismissal* of a suit cannot be applied by reference to Section 107 of the Code to a rejection of an appeal. This is in consonance with the general trend of opinion that the rejection of an appeal under Order 41 Rule 10 can be set aside under the *inherent power* of the Court,³ for, the Court could not act under its inherent power where there is a specific provision under the Code, namely, Section 107 under which it could act.

If, therefore, an application to set aside the rejection of an appeal can only lie under the Court's *inherent power*, is such an application governed by this Article? It is submitted that it is not. A *rejection* of an appeal cannot be considered to be a *dismissal* of the appeal within the meaning of this Article, and, secondly, it is a general principle of law that the law of limitation does not apply to the exercise by the

2. (1930) A I R 1930 Rang 228 (231) : 8 Rang 350 : 127 Ind Cas 161 (F B). *Abdul Ganny v. Mrs. I. M. Russel*.

(1933) A I R 1933 Rang 96 (97) : 142 Ind Cas 185, *Ma Sein v. S. T. R. M. Firm*. (A I R 1930 Rang 228 (F B), Followed)

Note 4

1. (1916) A I R 1916 Cal 812 (813) : 40 Ind Cas 234, *Goljan Dibi v. Nasar Ali*. (Question whether application under Order 41 Rule 19 lies and whether it is governed by Art. 168, was raised but was left open)

2. *Abdul Ganny v. Mrs. I. M. Russel*, *Annals*
R. 2 of
rejected

3. See cases cited in Foot-Note 3 of Note 2.

Court of its inherent powers and an application by a party invoking the exercise of the Court's inherent powers is not therefore governed by this Article.⁴

Article 168
Notes
4—6

5. Application to restore appeal rejected for non-payment of court-fee. — A files a memorandum of appeal but fails to pay sufficient stamp fee thereon. The Court grants him some time within which he is to make good the deficiency. On his failure to so make good the deficiency, the Court rejects the memorandum of appeal. A applies for re-admission of the appeal. Does such an application lie, and if so, what is the limitation applicable to it? It has been assumed in the undermentioned case¹ that such an application would lie and that it would be governed by this Article. It is submitted that this view does not seem to be correct. Order 41 Rule 3 provides for cases in which an appeal may be rejected, but the deficiency in payment of court-fee is not one of such cases. There is a conflict of opinion on the question whether Order 7 Rule 11 of the Civil Procedure Code read with Section 107 of that Code will enable a Court to reject an appeal for payment of insufficient court-fee, one view being that the Appellate Court can so reject an appeal,² the contrary view being that Order 7 Rule 11 does not apply to such cases.³ If the first view is assumed to be correct, then a *re-admission* of the rejected appeal can only be under the Court's *inherent* powers, there being no specific provision in the Code for such re-admission. If the second view is assumed to be correct, the Appellate Court can only *dismiss* and not reject the appeal,⁴ but a re-admission of an appeal so dismissed can only be under the Court's *inherent* powers, there being no provision in the Code for any such re-admission. In either view an application for re-admission will not be governed by the law of limitation and therefore by this Article.

6. Dismissal without jurisdiction. — Where a dismissal of an appeal purporting to be under Order 41 Rule 17 was without jurisdiction, it was held by the High Court of Lahore that the application to restore the appeal was not governed by this Article.¹ The better ground on which the decision can be rested will, it is submitted,

4. See cases cited in Foot-Note (4) to Note 2

Note 5

1. (1889) 1889 All W N 151 (151), *Bhundar Tiwari v. Thakur Tiwari*.

2. See Note 9 to S. 149 of the Authors' Commentaries on the Code of Civil Procedure

[See also (1922) A I R 1922 Pat 281 (282) · 63 Ind Cas 99, *Suraj Pal Pandey v. Uthim Pandey*]

(1920) A I R 1920 Pat 603 (609) 55 Ind Cas 502, *Sirdar Singh v. F. F. Christian*]

3. See Note 9 to S. 149 of the Authors' Commentaries on the Code of Civil Procedure

4. (1922) A I R 1922 Nag 60 (63) 18 Nag L R 11 · 76 Ind Cas 884, *Seth Sagunchand v. Lala Chhabilaram*.

Note 6

1. (1924) A I R 1924 Lah 279 (280) 69 Ind Cas 618, *Ata Muhammad v. Shanhar Das*

Article 168
Notes
6-9

be that there is no valid dismissal in such a case, that therefore the appeal must be deemed to be pending, and that the application is really not one to restore any appeal dismissed at all, within the meaning of this Article.

7. Application made in time — Party impleaded afterwards — Effect. — There is nothing in the Civil Procedure Code which provides that an application to restore an appeal under Order 41 Rule 19 should expressly implead a particular party. Ordinarily, it is advisable to mention the names of all persons on whom notices of the application should be served. But if no names are mentioned and the record enables the Court to ascertain the names of the persons on whom notices should be served and notice is, in fact, given, the application cannot be dismissed merely on the ground that the name of a party was not mentioned in the application and that an application could not be considered to have been made against him within the period of limitation.¹

8. Starting point.—Time under this Article runs from the date of the order of dismissal, and not from the date of the applicant's knowledge of the order.¹

The minority of the applicant is no answer to a plea of limitation under this Article, as Section 6 *ante* does not apply to applications contemplated by this Article.²

9. Court cannot extend time prescribed by this Article.—As has been seen in Note 3 to Section 3 *ante*, the Court has no inherent power to extend the period of limitation prescribed by the various Articles. The Court has therefore no power to entertain an application governed by this Article for re-admission of an appeal, after the prescribed period.¹ Where an application for re-admission of an appeal which could have been filed under Order 41 Rule 19 of the Civil Procedure Code is not filed within the period prescribed by this Article, the Court cannot entertain an application for re-admission, under its inherent powers.² The reason is that where a specific

Note 7

1. (1937) A I R 1937 All 362 (362) : 169 Ind Cas 246, *Mt. Kalarati v. Daya Nund*.

Note 8

1. (1920) A I R 1920 Lah 309 (309) : 58 Ind Cas 789 : 1 Lah 363, *Dissa Mal v. Kesar Singh*.
2. (1921) A I R 1921 Bom 20 (20, 22) : 45 Bom 648 : 60 Ind-Cas 919, *Sonubai Daburao v. Shitajirao Krishnarao*.

Note 9

1. (1890) 1890 All W N 196 (196), *Manrakhan Mair v. Sobha Singh*.
2. (1920) A I R 1920 Lah 309 (310) : 1 Lah 363 : 58 Ind Cas 789, *Dissa Mal v. Kesar Singh*.
- (1925) 91 Ind Cas 168 (169) (Lah), *Devidas v. Anantram*. (If so entertained, it will be tantamount to overriding the express statutory provision enacted in S. 3.)
- (1924) A I R 1924 Mad 114 (116) : 76 Ind Cas 836 : 47 Mad 171, *Krishnaswamy Naidu v. Chengalroya Naidu*.

procedure is prescribed in the Code and the party neglects to avail himself of it, the inherent powers of the Court could not be invoked.³

The provisions of Section 5 of the Act have not been made applicable to applications under Order 41 Rule 19 of the Code except in the Province of Madras. In provinces, therefore, in which that Section has not been extended to applications under Order 41 Rule 19 of the Code, the Court cannot resort to its provisions for extending the period prescribed by this Article.⁴ In the under-mentioned case⁵ an application clearly governed by this Article, but filed after time, was entertained as an application for review.

10. Rangoon High Court Rules of Procedure : Rule 9 sub-rule 2.—Rule 9 sub-rule 2 of the Appellate Side Rules of Procedure of the Rangoon High Court has been held to be *ultra vires* in so far as it prescribes a period of limitation less than that prescribed by Article 163 of this Act¹

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Notes
9—10

169.* For the re-hearing of an appeal heard *ex parte*.

Thirty days.

The date of the decree in appeal, or, where notice of the appeal was not duly served, when the applicant has knowledge of the decree

Article 169

*

Act of 1877

169 — For a re-hearing of an appeal heard *ex parte* in the absence of the respondent

Thirty days

The date of the decree in appeal.

Acts of 1871 and 1859

No corresponding provision

(1924) A I R 1924 All 446 (447) 46 All 144 78 Ind Cas 416, *Shib Prakash Joshi v Jhinguria*

(1890) 1890 All W N 196 (196), *Manrakhan Misr v Sobha Singh*

[But see (1933) A I R 1933 Rang 96 (98) 142 Ind Cas 185, *Ma Sein v S T R M Firm* (Submitted not correct)]

3 See (1935) A I R 1935 Rang 466 (471) 13 Rang 595 159 Ind Cas 945, *K P L S S Chelliar v Official Receiver, Ramnad*.

4. (1889) 1889 All W N 151 (151), *Bhunder Tiwari v Thakur Tiwari*.

(1879) 1879 Pun Re No 141, *Mah v Jiwan*

(1892) 1892 Pun Re No 44, *Kabir v Khauaja Muhammad Khan*.

(1925) 91 Ind Cas 163 (163) (Lah), *Devdas v Anantram*

(1933) A I R 1933 Rang 96 (97) 142 Ind Cas 185, *Ma Sein v S T R M. Firm*

5 (1910) 6 Ind Cas 482 (483) (Lah), *Kashi Ram v Gopi Mal*

Note 10

1 (1930) A I R 1930 Rang 223 (231, 232) 8 Rang 380 127 Ind Cas 161 (F B), *Abdul Ganny v Mrs. I M Russel*

Article 169
Notes
1—3

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Burden of proof.
4. Starting point.

1. **Legislative changes.**—The starting point under the corresponding Article in the Act of 1877 was "the date of the decree in appeal;" so that a respondent could not apply for a re-hearing after thirty days from the date of the appellate decree even if he had not been served at all and had no knowledge of the decree till long after the expiry of the said period. He could however appeal from the decree and the Appellate Court could interfere under clause (c) of Section 100 of the Civil Procedure Code.¹

The words "or where notice of the appeal . . . decree" were added in the third column in the present Act to provide for such cases also.

2. **Scope of the Article.**—This Article refers to applications made under Order 41 Rule 21 of the Civil Procedure Code which provides for a re-hearing of an *appeal* heard and decided *ex parte* against a respondent. Article 164 *ante* provides for an application to set aside an *ex parte* decree in a *suit*. Where a defendant against whom a decree in the suit had been passed *ex parte* applied in *appeal* to set the *ex parte* decree aside, the application was held, assuming the Appellate Court had power to entertain it, to be governed by Article 164 and not this Article.¹

As has been seen in the Notes to Section 3 *ante*, a Court has no discretion to extend the period of limitation prescribed by the Schedule. The period of thirty days fixed by this Article cannot therefore be extended by the Court.²

3. **Burden of proof.**—It is incumbent on the applicant to show that the application is within time. Where he asserts that he had

Article 169 — Note 1

1. (1896) 19 Mad 414 (416), *Balaji Rau v. Sathabhoy*.
SC, 1896, 19 Mad 414 (416), Balaji Rau v. Sathabhoy, 107 Cal 103, Kailashchander v. Rashtra-

Note 2

- 2 (1895) 1883 Pun Re No. 66, *Sher v. Mohan Singh*.

no knowledge of the decree, he must show when he actually got the knowledge.¹

Article 169
Notes
3—4

4. **Starting point.** — The starting point under this Article is—

1. the date of the decree in appeal, or
2. where notice of the appeal was not duly served, when the applicant has *knowledge* of the decree.^{1a}

Where, under the Rules of the High Court, a first notice of the preliminary date for the appeal and a subsequent notice of the date fixed for hearing is required to be sent to the respondent, the question was raised, but not decided, whether "notice of the appeal" in the Article must be taken to refer to the first notice or to the subsequent notice.¹

As to the meaning of the words "duly served," see Notes to Article 164, *ante*

An application for re-hearing presented originally within the period of limitation but returned for amendment and presented after amendment after the period of limitation, cannot be rejected as being out of time.²

170.* For leave to appeal as a pauper.	Thirty days.	The date of the decree appealed from.
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Article 170

Synopsis

1. Legislative changes.
2. Scope of the Article.
3. Starting point.
4. Applicability of Section 5 of the Limitation Act to applications under this Article.
5. Extension of time under Section 6.
6. Power to grant time for payment of court-fee.

* Act of 1877

Substantially same as above

Act of 1871

162 —For leave to appeal as a pauper	Ninety days.	The date of the decree appealed against
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Act of 1859

No corresponding provision

Note 3

1 (1933) A I R 1933 Lah 882 (883) 147 Ind Cas 268, *Ghulam Hussain v. Makhan Lal*

Note 4

1a(1919) A I R 1919 Lah 447 (447) 1918 Pun Re No 96 47 Ind Cas 962, *Daulat Ras v. Jagat Ram*

1 (1933) A I R 1933 Lah 882 (882) 147 Ind Cas 258, *Ghulam Hussain v. Makhan Lal*

2 (1905) 5 Cal W N 816 (817), *Shama Prosad Ghose v. Tala Mullik*.

Article 170
Notes
1—3

Other Topics

Leave to file cross-objections in <i>forma pauperis</i> —Article not applicable	...	See Note 2, Pt. 5
No extension of time on equitable considerations	...	See Note 2, Pt. 1
Time for copy excluded	...	See Note 3, Pt. 2

1. Legislative changes.—This Article is the same as Article 170 of the Act of 1877, except that the word 'from' is substituted for 'against.' It corresponds to Article 162 of the Act of 1871, but under that Act the period of limitation was ninety days.

2. Scope of the Article.—Order 44 Rule 1 of the Code of Civil Procedure provides for an application for leave to appeal as a pauper. Such applications would be governed by this Article. The Court cannot extend the time for filing such applications on any equitable considerations.¹ Where an appeal is filed in time but with insufficient court-fee and, subsequently, after the expiry of the period prescribed by this Article, the Court calls upon the appellant to furnish additional stamp fee and the appellant thereupon applies to the Court for leave to continue the appeal in *forma pauperis*, it is clear that the application is barred under this Article.² In *Mahadev Balvant v. Lakshman Balvant*,³ their Lordships of the Bombay High Court observed that if such applications were allowed after the period prescribed by this Article, the result would be to extend the period allowed by the Article for the benefit of an appellant who has put in insufficient stamps and then applies to appeal in *forma pauperis*. Where an appeal was filed against the preliminary decree on payment of proper court-fee, but the Appellate Court converted the same into an appeal against the final decree, which had been subsequently passed, and called upon the appellant to furnish additional stamp, and thereupon the appellant applied for leave to appeal in *forma pauperis*, it was observed by the High Court of Madras that such an application would be governed by Article 181.⁴

The Article applies only to applications for leave to appeal in *forma pauperis* and not to applications for leave to file cross-objections in *forma pauperis* in an appeal.⁵

3. Starting point.—Time, under this Article, runs from the date of the decree. And the period of limitation is thirty days, even though the period of limitation for the appeal itself might be ninety

Article 170 — Note 2

1 See Note 3 to Section 3 ante

2 (1915) A I R 1915 All 310 (311) · 29 Ind Cas 1003, *Gali v. Rachla Kunwar*. (1894) 19 Bom 48 (50), *Mahader Balvant v. Lakshman Balvant*.

3 (1894) 19 Bom 48 (50).

4 (1920) A I R 1920 Mad 230 (231) : 54 Ind Cas 761, *Solayyappa Chetty v. Lakshmanan Chetty*

5. (1910) 7 Ind Cas 118 (122) : 15 Cal W N 205 · 12 Cal L Jour 173, *Gobinda Ram Das v. Radha Kallabh Das*.

(1929) A I R 1929 Pat 31 (32) : 119 Ind Cas 900 · 7 Pat 827, *Mt. Chander Kala Kuer v. Mt. Dulhin Taja Kuer*.

days, as in the case of an appeal to the High Court.¹ The time requisite for the copy of the decree obtained should be excluded under the provisions of Section 12 *ante*. See Notes to Section 12 and the undermentioned case.²

Article 170
Notes
3—6

4. Applicability of Section 5 of the Limitation Act to applications under this Article.—See Notes 1 and 29 to Section 5 *ante*, and the undermentioned case.¹

5. Extension of time under Section 6.—Section 6, *ante*, does not apply to applications to file an appeal in *forma pauperis* and consequently, even an application by the next friend of a minor must be within the time allowed by this Article.¹

6. Power to grant time for payment of court-fee.—The rejection of an application for leave to appeal as a pauper does not *ipso facto* carry with it the rejection of the memorandum of appeal filed along with it.¹ The memorandum of appeal is a separate document before the Court which remains for disposal after the rejection of the application, and the Court has power under Section 149 of the Civil Procedure Code to give further time for the payment of the requisite court fee stamp and admit the appeal.² The memorandum of appeal, though originally unstamped, is not a nullity and can be validated with effect from the date of the presentation, by the

Note 3

1. (1890) 12 All 79 (93). 1890 All W N 25, *Parbati v. Bhola*.

2. (1890) 12 All 79 (93, 95). 1890 All W N 25, *Parbati v. Bhola*.

Note 4

1. (1910) 7 Ind Cas 944 (944, 945). 34 Bom 589, *Chintaman Vyankatarao v. Ramchandra Vyankatarao*.

Note 5

1. (1909) 4 Ind Cas 1002 (1003) (Lah), *Seia Datt Perishad v. Collector of Lahore*.

Note 6

1. (1918) A I R 1918 Mad 1039 (1040). 40 Mad 687. 38 Ind Cas 617, *Nellatadivu Ammal v. Subramania Pillai*.

(1935) A I R 1935 All 620 (625). 157 Ind Cas 347. 57 All 983 (FB), *Mt. Shahzadi Begam v. Alakh Nath*.

(1918) A I R 1918 All 194 (194). 40 All 381. 45 Ind Cas 29, *Muhammad Farzand Ali v. Rahat Ali*.

(1931) A I R 1931 Rang 131 (134). 9 Rang 92. 132 Ind Cas 707, *Maung San Shwe v. Hays Ko Ishag*.

{But see (1913) 18 Ind Cas 518 (518) (Low Bur), *Mg Wa Tha v. Abdul Gani Osman*.}

2. (1925) A I R 1925 Pat 442 (443). 4 Pat 67. 94 Ind Cas 814, *Rajendra Prasad v. Gopal Prasad*.

(1898) 22 Bom 849 (857, 861), *Bai Ful v. Desai Manorbhas Bhatandas*.

(1897) 21 Bom 576 (579), *Juminabai v. Vissondas Rutton Chand*.

(1909) 4 Ind Cas 896 (897). 1909 Pun Re No. 94, *Hari Singh v. Gurbakhsh Singh*.

(1926) A I R 1926 Oudh 13 (14). 90 Ind Cas 371, *Sajjad Ali Khan v. Jagmohan Das*.

(1906) 26 All 329 (331). 1904 All W N 24, *Girwarlal v. Lakshmi Narain*.

{See (1935) A I R 1935 Pesh 22 (23). 154 Ind Cas 943, *Tilaya Ram v. Ghansam Das*.}

Article 170
Note 6

payment of the court-fee.³ The Appellate Court can also, in a fit case, excuse the delay under Section 5 of the Limitation Act and admit the appeal after the expiry of the limitation, on payment of the full court-fee.⁴ But where the application for leave to appeal as a pauper is itself filed after the period of limitation has expired, the subsequent payment of court-fee will not validate the appeal under any circumstances.⁵

Article 171

<p>171.* Under the Code of Civil Procedure, 1908, for an order to set aside an abatement.</p>	<p>Sixty days.</p>	<p>The date of the abatement.</p>
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Synopsis

1. Legislative changes.
2. Scope.
3. Starting point.
4. Applicability of Section 5 to applications governed by this Article.

1. **Legislative changes.** — See Note 1 to Article 172, *infra*.

2. **Scope.** — Under Order 22 of the Code of Civil Procedure, a suit may abate :

1. where the plaintiff or defendant dies and the right to sue does *not* survive, or
2. where the plaintiff or defendant dies and the right to sue survives, but no application is made within the time

* **Act of 1877**

See under Article 172, *infra*.

[But see (1935) A I R 1935 Rang 836 (339) : 13 Rang 50 : 159 Ind Cas 468, *Vertannes v. Lawson*.]

3. (1922) A I R 1922 Lah 225 (226) : 3 Lah 35 : 65 Ind Cas 741, *Dyal Das v. Sundar Das*.

(1916) A I R 1916 Low Bur 124 (124) : 82 Ind Cas 630, *Swan Tee v. Ma Ngwe*.

[But see (1916) A I R 1916 Low Bur 58 (59) : 82 Ind Cas 531, *Shanghai Life Insurance Co. Ltd. v. Helen Constance Brown*.

(1914) 22 Ind Cas 884 (884, 895) : 7 Low Bur Rul 90, *Anomally v. O. M. M. R. M. Chetty Firm*.

(1929) 115 Ind Cas 678 (678-679) (Pat), *Rajendra Prasad v. Gopal Prasad*.

(1891) 18 All 805 (303) : 1891 All W N 99, *Dishnath Prasad v. Jagarnath Prasad*.

(1932) A I R 1932 Oudh 813 (314) : 140 Ind Cas 190, *Mt. Rayasulnissa Begam v. Mt. Ashara Begam* }

4. (1925) A I R 1925 All 499 (499) : 111 Ind Cas 655, *Ram Charan v. Bansidhar*.

5. (1904) 26 All 329 (330, 331) : 1904 All W N 24, *Gurukulal v. Lalshmi Narain*.

(1899) 26 Cal 923 (923), *Durga Charan Nasikar v. Doohiram Nasikar*.

[See (1933) A I R 1933 All 803 (309) : 144 Ind Cas 79, *Mt. Shahzads Begam v. Alakh Nath*.]

limited to bring the legal representatives of the deceased party on record.

Article 171
Note 2

In the first case, no question of *setting aside* the abatement arises, inasmuch as there can be no person entitled to make any such application.¹ In the second case, the legal representative can, under Order 22 Rule 9 sub-rule 2, apply for *setting aside* the abatement. This Article will apply to such applications.

Where an application is not for *setting aside any abatement*, this Article will have no application. Thus, where A institutes a *representation* suit on behalf of himself and on behalf of others, and dies pending the suit, any of the other persons who are constructively already parties to the suit can apply to *continue* the suit under the provisions of Order 1 Rules 1 and 10 of the Civil Procedure Code, independent of any question as to the applicability of Order 22 Rules 3 and 4 relating to abatement of suits.² Such applications are not for setting aside any abatement and are not governed by this Article.³ In the undermentioned case,⁴ A, the nearest reversioner, sued to set aside a widow's alienation and died pending suit. The Court declared *suo motu* that the suit abated. The next reversioner thereafter applied under Order 22 Rule 9 of the Code of Civil Procedure for setting aside the abatement. It was held that the application could be treated as one under Order 1 Rule 1 of the Civil Procedure Code to continue the suit, and would be governed by Article 181 of the Limitation Act.

See also Notes to Article 172, *infra*.

Article 171 — Note 2

- 1 (1931) A I R 1931 Lah 79 (80) : 131 Ind Cas 98 : 12 Lah 275, *Lachhman v. Bansu Lal*.
2. (1915) A I R 1915 P C 124 (126, 127) : 38 Mad 406 : 42 Ind App 125 : 29 Ind Cas 298 (P C), *Venkatanarayana Pillai v. Subbammal*.
(1931) A I R 1931 Lah 79 (80) : 131 Ind Cas 98 : 12 Lah 275, *Lachhman v. Bansu Lal*.
- (1917) A I R 1917 Mad 389 (390) : 34 Ind Cas 384 : 40 Mad 110, *Parameswararam v. Narayanan*. (Dissented from A I R 1915 All 59.)
- (1925) A I R 1925 Mad 244 (244) : 85 Ind Cas 666, *Gulam Gouse v. Dost Md. Khan*.
- (1931) A I R 1931 Mad 590 (591) : 132 Ind Cas 289 : 54 Mad 770, *Mahomed Kannu Routhier v. Naina Mahomed Routhier*.
[See also (1921) A I R 1921 P C 123 (124) : 48 Cal 493 : 48 Ind App 12 : 17 Nag L R 37 : 62 Ind Cas 737 (P C), *Raja Anand Rao v. Ramdas Dadusam*. (A suit under S 92, Civ. Pro. Code, 1908 (S. 599, Civ. Pro. Code, 1882) does not abate; it being a suit which is not prosecuted by any individuals for their own interest, but as representatives of the general public.)
- (1917) A I R 1917 Mad 389 (390) : 40 Mad 110 : 34 Ind Cas 384, *Parameswararam v. Narayanan*. (Suit under S 92 of the Civ. Pro. Code, is a representative suit.)
3. (1917) A I R 1917 Mad 389 (390) : 34 Ind Cas 384 : 40 Mad 110, *Parameswararam v. Narayanan*.
- (1931) A I R 1931 Mad 590 (591) : 132 Ind Cas 289 : 54 Mad 770, *Md. Kannu Routhier v. Naina Mahomed Routhier*. (Article 181 would apply.)
4. (1919) A I R 1919 Mad 479 (480) : 49 Ind Cas 265, *Krishnaswamy Iyer v. Seethalakshmi Ammal*

Article 171
Note 3

3. Starting point.—The *terminus a quo* under this Article is the date of the abatement. Under the Code of Civil Procedure of 1882, an order of abatement had to be passed by the Court, before the suit could be considered as abated.¹ Under the present Code, an abatement takes place *automatically* when legal representatives of the deceased are not brought on record within the prescribed time and no formal order is necessary.^{1a} Therefore, an application for setting aside an abatement must be made within the period of sixty days from the actual abatement and not from the passing of an order declaring the abatement.² An application for substitution may, in substance, be treated as an application to set aside abatement;³ but

Note 3

1. See (1885) 9 Bom 275 (278, 279), *Fulahu v. Goculdas Valabhadas*.
(1901) 9 Cal W N 369 (370), *Ram Protap v. Lal Chand*.
- 1a (1924) A I R 1924 Lah 424 (424) : 74 Ind Cas 17, *Badlu v. Mt. Naraini*.
2. (1926) A I R 1926 All 217 (220) : 93 Ind Cas 313 : 48 All 334 (F B), *Churya v. Baneshwar*.
(1911) 11 Ind Cas 559 (560) : 35 Bom 393, *Lakhmichand Hewachand v. Kachubhai Gulabchand*. (In this case, even though the application under the Article was barred, the Court added the applicant as a party to the suit under its power under Order 1 Rule 10, C. P. C.)
- (1915) A I R 1915 Lah 382 (383) : 81 Ind Cas 697, *Bhansi Ram v. Narain Singh*. (An application should be made within sixty days from the date of the abatement.)
[See also (1919) A I R 1919 Cal 294 (295) : 51 Ind Cas 534, *Prisya Sundart v. Golapdi Shesh*. (Abatement order passed before expiry of six months—Application for setting aside order within sixty days of order is maintainable)]
- [But see (1922) A I R 1922 All 209 (210) : 66 Ind Cas 554 : 44 All 459, *Mt. Gujrati v. Sital Mistr*.
- (1930) A I R 1930 All 379 (380) : 127 Ind Cas 419, *Tulsi Ram v. Municipal Board, Shahjahanpur*. (But this automatic abatement does not follow where party dies before conclusion of hearing)
- (1920) A I R 1920 All 294 (295) : 42 All 540 : 59 Ind Cas 903, *Lachmi Narain v. Mohammad Yusuf*. (The absence of any order of abatement does not serve as an obstacle to the making of an application for substitution of name which is in effect an application to set aside the order of abatement)
- (1926) A I R 1926 Lah 234 (235) : 7 Lah 73 : 94 Ind Cas 422, *Qaim v. Nura*.
- (1937) A I R 1937 Nag 88 (89) : 169 Ind Cas 853, *Harisa Ratansa v. Janu*. (Application to set aside abatement within sixty days of abatement is proper and not premature even if made before order of Court that suit has abated)
- (1933) A I R 1933 Lah 356 (359) : 14 Lah 543 : 142 Ind Cas 619, *Chuni Lal Tulsi Ram v. Amin Chand*]
3. (1928) A I R 1928 Lah 746 (747) : 112 Ind Cas 5, *Kirpa Ram v. Bhagat Chand*.
(1920) A I R 1920 All 294 (285) : 42 All 540 : 59 Ind Cas 903, *Lachmi Narain v. Mohammad Yusuf*.
- (1924) A I R 1924 Lah 424 (424) : 74 Ind Cas 17, *Badlu v. Mt. Naraini*.
- (1927) A I R 1927 Oudh 221 (221) : 2 Luck 592 : 101 Ind Cas 841, *Ehalil Ahmad Khan v. Khatir Zaman*.
- (1930) A I R 1930 Cal 422 (424) : 57 Cal 148 : 124 Ind Cas 817, *Janakinath Singha v. Nirodbaran Ray* (*Held*, in the circumstances of the case that the application for substitution could not be treated as an application for setting aside the abatement.)

not when the merits of the case are against the petitioner.⁴

4. Applicability of Section 5 to applications governed by this Article. — Order 22 Rule 9 sub-rule 3 provides that the provisions of Section 5 of the Limitation Act shall apply to applications under sub-rule 2, i. e., to applications to set aside abatements

As to what is "sufficient cause" within the meaning of Section 5 *ante*, see Notes to that Section.

As to what is "sufficient cause" within the meaning of Order 22 Rule 9 sub-rule 2 of the Civil Procedure Code, see the Authors' Commentaries on the Civil Procedure Code, Order 22 Rule 9, Note 8

See also the undermentioned cases.¹

Article 171
Notes
3—4

172. Under the same Code by the assignee or the receiver of an insolvent plaintiff or appellant for an order to set aside the dismissal of a suit or an appeal.	Sixty days.	The date of the order of dismissal.
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Article 172

Synopsis

1. Legislative changes.
2. Scope and applicability.
3. Starting point.

* Act of 1877		
172 — Under section 371 of the Code of Civil Procedure, or under that section and section 582 of the same Code, for an order to set aside an order for abatement or dismissal.	Sixty days	The date of the order for abatement or dismissal

Acts of 1871 and 1859
No corresponding provision

- (1937) A I R 1937 Lah 455 (457) 174 Ind Cas 700, *Diwan Chand Nirmal v Bhagwan Chand*
[See (1929) A I R 1929 Lah 634 (635) 119 Ind Cas 759, *Raghunath Rai v Radha Kishan Panna Lal*]
4 (1924) A I R 1924 Mad 713 (714) 80 Ind Cas 397, *Seshamma v Venkata Rao*.
(1930) A I R 1930 Cal 422 (424) 57 Cal 149 124 Ind Cas 817, *Janalath Singha v. Niroddharan Ray*

Note 4

1. (1926) A I R 1928 Mad 404 (405) 103 Ind Cas 288, *Ramachandran v*

(1924)

- (1938) A I R 1938 Mad 218 (218) I L R (1938) Mad 275 174 Ind Cas 951, *Secretary of State v Kistnamacharyulu* (Ignorance of death of respondent in absence of negligence is sufficient cause to excuse delay in seeking to set aside abatement)

Article 172
Notes
1—2

1. Legislative changes.

1. There was no Article corresponding to this in the Act of 1871.
2. Article 171 of the Act of 1877 as substituted by Act VII of 1888 contained the provisions of the present Articles 171 and 172 in a combined form.
3. An application to set aside an *abatement* is separately provided for by Article 171, and this Article provides only for an application by an assignee or receiver of an insolvent plaintiff or appellant to set aside the *dismissal* of a suit or an appeal.

2. **Scope and applicability.** — Under the provisions of the Civil Procedure Code, Order 22 Rules 3 and 4, where a party to a suit dies, there can be no *dismissal* of the suit but only an *abatement*. In the case of the insolvency of the plaintiff, Order 22 Rule 8 provides that the insolvency of a plaintiff shall not cause the suit to abate "unless the receiver or assignee declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct." Sub-rule 2 of that Rule provides that where such assignee or receiver neglects or refuses to continue the suit and to give security within the time so ordered, the defendant may apply for the *dismissal* of the suit on the ground of the plaintiff's insolvency and the Court may make an order accordingly.

There is a conflict of opinion as to whether there can be an *abatement* in the case of the insolvency of the plaintiff. On the one hand it has been held by the High Court of Lahore that when the receiver or assignee declines to continue the suit, the suit will *abate* even without an application by the defendant for dismissal of the suit under sub-rule 2.¹ The High Courts of Allahabad,² Madras,³ Calcutta⁴ and Bombay⁵ are of the view that there is no *abatement* in such cases, and the suit will be pending as long as it is not dismissed under sub-rule 2.

Order 22 Rule 9 sub-rule 2 provides that where a suit has abated or has been dismissed, "the plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee

(1915) A I R 1915 Mad 132 (133) : 26 Ind Cas 472, *Kandasami Chetty v. Murugappa Chetty*. (That the plaintiff was ill-advised is not a sufficient cause to excuse delay.)

Article 172 — Note 2

1. (1928) A I R 1928 Lah 596 (597) : 110 Ind Cas 910 : 10 Lah 208, *Mulchand Ganga Disha v. R. M. Downie & Co.*
2. (1922) A I R 1922 All 361 (362) : 43 All 621 : 64 Ind Cas 52, *Khunni Lal v. Rameshar*.
3. (1920) A I R 1920 Mad 736 (738) : 61 Ind Cas 300, *Official Assignee, Rangoon v. Chidambaram Chetty*.
4. (1927) A I R 1927 Cal 76 (77) : 98 Ind Cas 781 : 53 Cal 844, *Kissen Gopal Karnani v. Suklal Karnani*.
5. (1892) 16 Bom 404 (406, 407), *Lehhraj Chunilal v. Shamlal Narrondas*. (1875) 12 Bom H C R 257 (261), *Ibrahim Mahsin v. Abdul Rahman Ali*.

or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal."

Order 22 Rule 11 of the Civil Procedure Code provides that the word "suit" in that Order includes an appeal. Consequently, Rules 8 and 9 would apply to appeals also

This Article applies only to an application by the assignee or the receiver of an insolvent plaintiff or appellant for an order to set aside the *dismissal* of a suit or appeal. In other words, it applies to an order under sub-rule 2 of Rule 9 of Order 22 to set aside a *dismissal* under Rule 8. Article 171 *ante* applies to applications to set aside abatements.

The Article only applies to applications by the receiver or assignee of an insolvent *plaintiff or appellant* and hence does not apply to the case of an insolvent *defendant or respondent*. For the procedure in the case of a *defendant* becoming insolvent, see the undermentioned case⁶

3. Starting point.—Time runs from the date of the order of dismissal. Under sub-rule 3 of Order 22 Rule 9 of the Civil Procedure Code the provisions of Section 5 of this Act have been made applicable to applications under Order 22 Rule 9 sub-rule 2, i. e. to applications contemplated by this Article.

173.* For a review of judgment except in the cases provided for by article 161 and article 162.

Ninety days. | The date of the decree or order.

Article 172
Notes
2—3

Article 173

Synopsis

1. Legislative changes.
2. Scope and applicability.
3. "Review."
4. Applicability of Sections 5 and 12 of the Act to applications for review.
5. Starting point.
6. Court-fee and limitation.

* Act of 1877
Substantially same as above.

Act of 1871

164 For a review of judgment | Ninety days | The date of the decree.

Act of 1859

No corresponding provision

Article 173
Notes
1—5

1. Legislative changes.—In Act IX of 1871, this Article appeared as Article 164 and embraced all kinds of review as there was no provision corresponding to Articles 161 and 162 of the present Act. The Article appeared in its present form as Article 173 in Act XV of 1877, the only difference being that Article 161 was numbered Article 160A.

2. Scope and applicability.—This Article proscribes the period of limitation for all applications for review other than those specifically dealt with by Articles 161 and 162 *ante*. It is however only where an *application* is made for review that this Article would apply. No question of limitation would arise where a review is made by the Court under its *inherent* powers.¹

See also Note 2 to Article 162, *ante*

3. "Review."—See also Note 3 to Article 162, *ante*.

A review must, on the one hand, be distinguished from an *amendment* of a clerical error and on the other, from an *appeal*. The object of a review is to alter the *decision* of the Court, while the object of an amendment by correction of clerical error is to make the judgment or decree read what *it was intended* to read.¹

A review is distinguishable from an *appeal* in that the primary intention of a review is the reconsideration of the matter by the *same Judge* under certain conditions, while an appeal is a re-hearing by *another* tribunal.²

As to other points of distinction between a review and an amendment or an appeal, and also as to the circumstances under which and the cases in which a review will lie, see the Notes in the Authors' Commentaries on the Civil Procedure Code, Order 47 Rules 1 and 7.

4. Applicability of Sections 5 and 12 of the Act to applications for review.—See Notes to Sections 5 and 12, *ante*.

5. Starting point.—Time under this Article runs from "date of the decree or order." (For meaning of the words "date of the decree," see Note 5 to Article 156 *ante*.) Order 20 Rule 7, Civil Pro. Code,

Article 173 — Note 2

- 1 (1918) A I R 1918 All 229 (230) : 43 Ind Cas 490 : 40 All 68, *Khurshed Alam Khan v. Rahmat Ullah Khan*.
 [See also (1924) A I R 1924 Pat 673 (677) : 3 Pat 930 : 80 Ind Cas 667, *Mani Lal v. Durga Prasad*]

Note 3

1. See (1870) 13 Suth W R 33 (33), *Assur Ali v. Woolfutoonissa*. (But a petition for the rectification of a decree is not different from an application for a review when the object of the rectification is to alter the decision of the Court.)
 (1869) 12 Suth W R 65 (66), *Modhoo Soodun Ghose v. Romanath Ghose*. (An application for review and an application for an alteration of a clerical error in a decree have not the same period of limitation.)
 2. (1865) 3 Suth W R D C 145 (17, 40) : 7 Moo Ind App 222 : 1 S. & P. 225 : 1 Sar 645 (P)
 (1868) 9 Suth
Chucker

provides that the decree shall bear date the day on which the judgment was pronounced. It follows that time runs from the date the judgment sought to be reviewed was pronounced.¹ The fact that some other proceedings in relation to the decree or order have terminated at a later date² or that the applicant had knowledge of the decree at a later date³ does not postpone the starting point to such date, though such facts may furnish a sufficient cause for extending the time under Section 5 of the Act.⁴

The mere fact that a judgment *has been written* will not start limitation running. It must be *pronounced*.⁵

Where a decree is *amended*, the date of the decree is not thereby altered,⁶ but an application for review based on the amendment may be allowed under Section 5 of the Act.

6. Court-fee and limitation.—By the application of Section 5 or Section 12 of the Limitation Act, an application for review may be within time even if it is made after ninety days. Where an application for review of judgment is filed on or after the 90th day from the date of the decree, Article 4 of Schedule 1 of the Court-fees Act provides that it should be chargeable with the full fee leviable on the plaint or memorandum of appeal. Otherwise, under Article 5 of that Act only half the fee is leviable.

But the Court-fees Act cannot enable a party to apply for a review beyond the period of limitation reckoned according to law, merely by reason of the fact that he has paid a full court-fee. Thus, where ninety days from the date of the decree have expired, and time is not extended by the application of S 5 or S 12 of the Act, no application for review will lie, even though the full court-fee leviable on the plaint is paid. The reason is that the Court-fees Act cannot

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Notes
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Note 5

- 1 (1884) 1884 All W N 330 (330), *Kubber Singh v Fateh Singh*
- 2 (1884) 1884 All W N 330 (330), *Kubber Singh v Fateh Singh*
- 3 (1929) A I R 1929 All 545 (547) 119 Ind Cas 99, *Debi Dayal v Ambika Prasad*
- (1929) A I R 1929 All 485 (488) 121 Ind Cas 552, *Baldeo Prasad Shukul v. Sukhdeo Prasad Shukul*.
- 4 (1929) A I R 1929 All 485 (488) 121 Ind Cas 552, *Baldeo Prasad v Sukhdeo Prasad*
- 5 (1928) A I R 1928 Pat 129 (130) 1 Pat 771 75 Ind Cas 879, *Sagarmal Marwari v Lachmisan Misir*
- 6 (1920) A I R 1920 Pat 622 (626, 630) 5 Pat L Jour 472 57 Ind Cas 236 (FB), *Golab v Janki Kuer*
- (1917) A I R 1917 Low Pur 162 (163) 35 Ind Cas 347, *Wor Lone v G. Ramey*
- (1899) 22 Mad 364 (367), *Parameshraya v Seshagiriappa*
- (1923) A I R 1923 All 22 (22) 69 Ind Cas 199, *Ram Chandar v Jas Mal*
- [But see (1915) A I R 1915 Nag 37 (39) 29 Ind Cas 589 11 Nag L R 92, *Dinaji v. Larman*.
- (1875) 23 South W R 433 (434), *Dulobhuddur Mahantee v Mudhoo-soodun Pandey* (Submitted not correct)]

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Note 6

affect the period of limitation prescribed by this Act.¹ Nor, on the other hand, will Article 5 of the Court-fees Act entitle a party to pay only half the fee on the ground that the application is not barred by limitation, if actually it has been made on or after the 90th day from the date of the decree.²

Section 28 of the Court-fees Act provides that where a document is, through *mistake or inadvertence* received, filed or used in any office without being properly stamped, the presiding Judge or the head of the office, as the case may be, may, if he thinks fit, order that the document should be stamped as he may direct; and on such document being stamped accordingly, the same and every proceeding thereto shall be as valid as if it had been properly stamped in the first instance. Under Section 149 of the Civil Procedure Code, where a document is presented in time with insufficient stamp, the Court may allow the deficiency to be paid and on such payment the document will have the same force as if such fee had been paid in the first instance. In the undermentioned case,³ where an application was presented with insufficient stamp but there was no mistake or inadvertence and the deficiency was made up only after the expiry of the period of limitation, it was held that Section 28 of the Court-fees Act did not apply and that the application was barred. Section 149 of the Civil Procedure Code was not adverted to. It must be assumed that their Lordships did not intend to exercise their discretion in favour of the applicant under Section 149 of the Code.

Article 174

<p>174.* For the issue of a notice under the same Code, to show cause why any payment made out of Court of any money payable under a decree or any adjustment of the decree should not be recorded as certified.</p>	<p>Ninety days.</p>	<p>When the payment or adjustment is made.</p>
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*** Act of 1877**

<p>173-A. — For the issue of a notice under section 258 of the same Code, to shew cause why the payment or adjustment therein mentioned should not be recorded as certified.</p>	<p>Ninety days.</p>	<p>When the payment or adjustment is made.</p>
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Acts of 1871 and 1859
No corresponding provision.

Note 6

1. (1918) A I R 1918 All 229 (230) 43 Ind Cas 490 : 40 All GS, *Khurshed Alam*

Bhulnath
v. the 89th

v. *Dayar*.

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Note 2

or adjustment to the Court whose duty it is to execute the decree. Sub-rule 2 contemplates an application by the judgment-debtor to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified. It thus affords protection to the judgment-debtor in the event of the failure of the decree-holder to act under sub-rule 1 and involves a judicial decision by the Court whether the payment should be recorded.¹

Under the old Civil Procedure Code, it was held by the Calcutta High Court² and the Chief Court of the Punjab³ that Section 258 (corresponding to Order 21 Rule 2 of the present Code) applied to any kind of decree and not merely to money decrees. The Madras High Court⁴ held that the Section was limited to decrees under which money was payable and did not apply to other kinds of decrees and that Article 173 A (Article 174 of the present Act) did not apply to an application by the judgment-debtor. Under the present Code of Civil Procedure, it has been held by the High Courts of Bombay⁵ and Calcutta⁶ that the addition of the words "of any kind" in sub-rule 1 makes it clear that the Rule applies to every kind of decree. But, according to the Madras High Court⁷ the change does not render the Rule applicable to all kinds of decrees and the Rule applies only to cases where money is payable under the decree, whether they are accompanied by other reliefs or not. See also the decision of the Privy Council in *Dorothy Margaret v. Henry Peter*,^{7a} which was a case under Section 349 of the Ceylon Civil Procedure Code, similar to Order 21 Rule 2 of the Code of Civil Procedure except that it does not contain the words "of any kind."

1. (1929) A I R 1929 P C 19 (22) . 114 Ind Cas 581 : 3 Luck 684 : 56 Ind App 90 (P C), *Shri Prokash Singh v. Allahabad Bank Ltd.*
2. (1891) 6 Cal 786 (788) . 8 Cal L R 96, *Baba Mohamed v. Webb*
3. (1906) 1906 Pun Re No 44 (at p. 158) : 1907 Pun L R No. 82 : 1906 Pun W R 81, *Lachu v. Kishen Lal*.
4. (1899) 22 Mad 182 (184) . 8 Mad L Jour 175, *Sankaran Nambiar v Kanara Kurup* (Decree for possession of immovable property.)
5. (1922) A I R 1922 Bom 380 (381) . 46 Bom 226 64 Ind Cas 490, *E. Enas Pavloo Gharry v K. Phillip Gowrya*.
6. (1928) A I R 1928 Cal 715 (717) : 117 Ind Cas 833, *Niamat v. Jahl*.
7. (1926) A I R 1926 Mad 749 (751) : 49 Mad 716 : 95 Ind Cas 731, *Narayana-swamy v. Rangaswamy*.
(1914) A I R 1914 Mad 360 (360) : 23 Ind Cas 530, *Abdul Latiff Sahib v. Bathula Bibi Ammal*.
(1918) A I R 1918 Mad 751 (754) . 40 Ind Cas 820, *Sethurama Sahib v. Cholita Rajah Sahib*.
(1920) A I R 1920 Mad 469 (470) : 43 Mad 476 : 56 Ind Cas 289, *Rama-krishna Rao v Balakrishna Rao*.

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(1920) A I R 1920 Pat 731 (733) : 57 Ind Cas 473, *Mangar Sahu v. Bhatoo Singh*.]

7a (1936) A I R 1936 P C 126 (129, 180) . 162 Ind Cas 8 (P C).

This Article is applicable only to an application under Order 21 Rule 2 sub-rule 2, by the *judgment-debtor*. It is not applicable to certification by the *decree-holder*.⁸

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2—3

Order 21 Rule 2 of the Code has been held to apply only to the case of parties who stand in the relation of judgment-debtor and judgment-creditor at the date of the transaction.⁹ This Article may not therefore apply if the payment is not by the judgment-debtor but by a stranger. But there is nothing in the Rule to limit the payment to the decree-holder only.¹⁰

Order 21 Rule 2 relates to an adjustment subsequent to the decree and not to a pre-decree arrangement. Thus, it does not apply to an adjustment made or agreement entered into after the date of the decree of the Court of first instance but before the date of the appellate decree dismissing the appeal.¹¹ Similarly, an application to record an alleged agreement not to execute the decree entered into prior to the passing of the decree cannot be entertained under this Rule and Article 174 will not govern such an application.¹²

The Article is not intended to apply to applications made under the Insolvency Acts, inasmuch as those Acts are intended to be complete Codes of the insolvency law applicable to the areas to which they apply and prescribe their own periods of limitation.¹³

The Article does not apply to adjustments made out of Court between the dates of the preliminary and final decrees for sale.¹⁴

3. Certification by decree-holder.—There is no specific Article in the Limitation Act for certification by the decree-holder under Order 21 Rule 2 sub-rule 1 of the Code of Civil Procedure. This Article does not govern such certification. Nor does Article 181 apply to the case, inasmuch as such certification has been held not to

- 8 (1929) A I R 1929 P C 19 (22) 3 Luck 684 114 Ind Cas 531 56 Ind App 80 (P C), *Shri Prakash Singh v. Allahabad Bank Ltd*
- (1922) A I R 1922 Cal 30 (31) : 68 Ind Cas 780, *Bali Mahomed Sahai v. Ajanmas*
- (1935) A I R 1935 Lah 194 (195) : 15 Lah 910 . 155 Ind Cas 315, *Sundar Das Ver Bhan v. Bishen Das*
- 9 (1911) 85 Mad 659 (665) 12 Ind Cas 657 (661), *Ponnusamy Nadar v. Letchmanan Chettiar* (Per Sundara Iyer, J)
- (1895) 19 Mad 230 (232) 5 Mad L Jour 218, *Rama Ayyan v. Sreenivas Patlar*.
10. (1923) A I R 1923 All 271 (271) 71 Ind Cas 457 45 All 304, *Mahadeo Prasad v. Mt Hamiden*, (Where a compromise decree directed the payment of money to a third person and the payment was not certified to the Court, *held*, it could not be relied upon in execution)
11. (1923) A I R 1923 Mad 619 (620) . 72 Ind Cas 836, *Ramanathan Chettiar v. Venkatachellam*.
- 12 (1928) A I R 1928 Rang 36 (37) 107 Ind Cas 860 5 Rang 685, *M. E. Moolla & Sons Ltd v. Chartered Bank of India, Australia & China*
- 13 (1927) A I R 1927 Rang 263 (264) 5 Rang 884 104 Ind Cas 816, *Jhan Bahadur Singh v. Bailiff, Dist Court, Tanjore*
- 14 (1930) A I R 1930 Mad 105 (107) 120 Ind Cas 72, *Rasim Chettiar v. Rinjaan Chettiar*.

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3—4

be an *application* at all.¹ But a certification made after the decree is time-barred will not save limitation.²

4. Application must be made by judgment-debtor.—The application for issue of notice contemplated by this Article is to be made by the *judgment-debtor*. The word 'judgment-debtor' includes persons claiming through him or in his right. Thus, a transferee of the equity of redemption in the property in suit from the judgment-debtor is a 'judgment-debtor' within the meaning of Order 21 Rule 2 of the Code of Civil Procedure.¹ It has also been held that a surety for a judgment-debtor can plead an uncertified payment or adjustment made by him.²

The information given to the executing Court in a *written statement* put in by the judgment-debtor in answer to an application

Note 3

1. (1929) A I R 1929 P C 19 (23) : 56 Ind App 30 : 114 Ind Cas 581 : 3 Luck 694 (P C), *Shri Prokash Singh v. Allahabad Bank Ltd.*
- (1928) A I R 1928 All 629 (631) : 112 Ind Cas 73 : 51 All 237 (F B), *Joti Prasad v. Srirchand.*
- (1930) A I R 1930 All 123 (124) : 124 Ind Cas 22, *Ram Sarup v. Muhammad Ubaidulla Khan.*
- (1931) A I R 1931 All 219 (221) : 132 Ind Cas 426, *Joti Prasad v. Baru Singh.*
- (1921) A I R 1921 Bom 411 (412) : 45 Bom 91 : 59 Ind Cas 399, *Pandurang Balakrishna v. Jagya Bhanu*
- (1929) A I R 1929 Cal 687 (689) : 57 Cal 789 : 127 Ind Cas 258, *Hridaymohan Sanyal v. Khagendranath Sanyal.*
- (1912) 17 Ind Cas 617 (618) (Mad), *Dharani Mudali v. Meenamba Bai.*
- (1915) A I R 1915 Cal 235 (236) : 27 Ind Cas 11, *Lakhi Narain v. Felamani Das.*
- (1919) A I R 1919 Cal 181 (182) : 50 Ind Cas 242, *Bahuballav Roy v. Jogesh Chandra*
- (1930) A I R 1930 Rang 64 (65) : 126 Ind Cas 540, *Maung Tun Hlaing v. U Aung Gyaw.*
- (1930) A I R 1930 Rang 329 (331) 8 Rang 310 : 127 Ind Cas 600, *Daw Ywet v. U Tin.*
- (1924) A I R 1924 Lah 676 (677) 75 Ind Cas 1029, *Fattu v. Nanak Chand.*
- (1916) A I R 1916 Mad 953 (959) : 31 Ind Cas 318, *Rajam Iyer v. Anantharatnam Aiyer.*
- (1918) A I R 1918 Mad 620 (621) : 41 Mad 251 : 41 Ind Cas 701, *Maslamani Mudaliar v. Sethuswamy Iyer.*
- (1929) A I R 1929 Mad 811 (811) : 117 Ind Cas 790, *Chinnaswamy Kavrayar v. Periaithambi Butler.*
- (1935) A I R 1935 Mad 922 (923) : 159 Ind Cas 83, *Gangayya v. Seshagiri Rao*
- (1927) A I R 1927 Oudh 7 (11) : 98 Ind Cas 353 : 29 Oudh Cas 353 : 1 Luck 428, *Prakash Singh v. Allahabad Bank Ltd.*
- (1919) A I R 1919 Pat 126 (137) : 50 Ind Cas 264, *Elahi Bux v. Nawab Lall.*
2. (1921) A I R 1921 Cal 643 (644) : 64 Ind Cas 72, *Madan Mohan Danikya v. Harulal Kundu.*
- (1924) A I R 1924 Oudh 392 (392) : 79 Ind Cas 799, *Mt. Janicanti Kunwar v. Mt. Mohan Dei*

Note 4

1. (1907) 30 Mad 537 (540) : 17 Mad L Jour 417 : 2 Mad L Tim 466, *Panduranga Mudaliar v. Vythilinga Reddi.*
2. (1926) A I R 1926 Sind 105 (107) : 96 Ind Cas 234 : 20 Sind L R 362, *Noor Muhammad v. Dhanuram.*

by the decree-holder for execution of the decree is a sufficient compliance with the requirements of Order 21 Rule 2 sub-rule 2 of the Code; and where such statement alleging adjustment is filed within ninety days of the alleged adjustment as required by this Article, the executing Court is entitled to go into the matter and certify it. This is the view held by the Bombay,³ Allahabad,⁴ Patna⁵ and Rangoon⁶ High Courts. The Calcutta⁷ and Madras⁸ High Courts have, on the other hand, held that to treat the statement of objection as an application would be to ignore the express language of the Rule.

An application by the judgment-debtor made six months after payment, applying for deposit of the balance and attaching a receipt for the previous payment and containing an endorsement of the subsequent payment by the decree-holder's pleader, is not an application for recording and certifying the previous payment under Order 21 Rule 2 sub-rule 2 of the Code.⁹

On dismissal for default of an application under sub-rule 2 of Order 21 Rule 2 of the Code, a fresh application by the judgment-debtor for the same purpose is not barred and he is entitled to have an adjudication on the merits subject to any objection that may be open to the decree-holder.¹⁰

5. "Adjustment," meaning of.—See Note 6 below and the undermentioned case.¹

6. Starting point.—The period of limitation for an application by the judgment-debtor under sub-rule 2 of Order 21 Rule 2 is ninety days from the time when the *payment* or *adjustment* is made and the parties cannot, by consent or agreement, extend or alter the period.^{1a} An application by the judgment-debtor to record satisfaction

- (1928) A I R 1928 Lah 61 (63) 108 Ind Cas 376, *Thakar Datt v Ram Singh*.
 3. (1935) A I R 1935 Bom 303 (304) 157 Ind Cas 646, *Kalyani Dhana v. Dharamsi Dhana & Co*
 4 (1929) A I R 1929 All 79 (80) 113 Ind Cas 760, *Ganga Dihal Rai v. Ram Audh*.
 5. (1930) A I R 1930 Pat 526 (527) 9 Pat 521 126 Ind Cas 159, *Chandi Charan v Panchanan Pandit*
 6. (1928) A I R 1928 Rang 62 (63) 5 Rang 833 110 Ind Cas 123, *Maung Tin v Ma Ma*
 (1911) 11 Ind Cas 780 (781) (Low Bur), *U Po Thaing v Maung Ba U*.
 7. (1912) 13 Ind Cas 944 (945) (Cal), *Dajrang Behari Lal v Lachmi Naram*.
 8. (1912) 17 Ind Cas 752 (753) (Mad), *Lodd Gouindass v Ramdoss*
 9 (1929) A I R 1929 All 674 (675) 115 Cas 139, *Frank Coombs v Mofussil Bank Ltd, Gorakhpur*
 10 (1931) A I R 1931 Lah 505 (505, 506) 132 Ind Cas 206, *Lakshpat Rai v. Bella Mal Jamal Rai*

Note 5

1. (1938) A I R 1938 Rang 828 (329), *Chokalingam Chettyar v Narayana Chettyar*.

Note 6

- 1a (1938) A I R 1938 Rang 828 (330), *Chokalingam Chettyar v Narayana Chettyar*

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6—7

of a decree made by him more than three years from the date of the decree against him will be barred, even if it may be within three months from the date of a revised decree against the defendants other than himself.¹

An "adjustment" of a decree is an agreement which *extinguishes* the decree as such in whole or in part, and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree.² It cannot mean an adjustment, to give effect to the terms of which would be to create a new decree at variance with the decree under execution and which will again have to be executed.³ An agreement reducing the amount of the decree by reason of certain arrangements between the parties is an adjustment.⁴ Likewise, an agreement to accept a portion of the decretal amount in full satisfaction of the decree is an adjustment within Order 21 Rule 2 of the Code and need not be reduced to writing.⁵

Where the judgment-debtor under a mortgage decree agrees with the decree-holder that if the latter purchased the property in court-auction, the judgment-debtor would put him in possession, and he is so put in possession, time for an application by the judgment-debtor to have the adjustment recorded will commence to run only from the date when the decree-holder gets possession of the property.⁶

An application under Order 21 Rule 2 sub-rule 2 of the Code is maintainable even before the decree is formally drawn up, inasmuch as the date of the decree is not the date on which it is reduced to writing and signed but the date on which the Court delivers judgment and expresses what the decree is.⁷

7. Effect of fraud. — Where the judgment-debtor alleges that the decree-holder had fraudulently kept him from exercising his right to apply under Rule 2 sub-rule 2 by promising that he would himself certify the payment or adjustment, can the judgment-debtor claim an extension of time under Section 18 of the Limitation Act?

1. (1916) A I R 1916 Mad 1010 (1011) : 31 Ind Cas 917, *Sambasiva Iyer v. Muhammad Hussain Rowther*.

2. (1885) 7 All 424 (431) : 1885 All W N 76, *Fateh Muhammad v. Gopal Das*.

3. (1928) A I R 1928 Cal 527 (529) : 113 Ind Cas 9, *Azisur Rahman v. Ahiraja Choudhry*.

4. (1921) A I R 1921 Pat 135 (137) : 6 Pat L Jour 337 : 63 Ind Cas 535, *Radha Kant Lal v. Mt. Parbati Kuer*.

5. (1935) A I R 1935 Bom 303 (305) : 157 Ind Cas 646, *Kalyanji Dhana v. Dharamsi Dhana & Co*.

(1933) A I R 1933 Lah 806 (807) : 14 Lah 668 : 145 Ind Cas 924, *Abdul Karim v. Hakam Mal Tanai Mal*.

6. (1935) A I R 1935 Mad 581 (582) : 158 Ind Cas 961, *Raghupathrayudu v. Garapati Pichayya*.

7. (1924) A I R 1924 Cal 1064 (1065) : 82 Ind Cas 746, *Giribala Das v. Dishambar Haldar*.

It was held in an early Madras case¹ and in a Bombay case² that the Court executing the decree could override the provisions of this Article and would not allow a clear case of fraud to be condoned by the provisions of Order 21 Rule 2 of the Code. But later cases in Madras³ and in Bombay⁴ have taken a contrary view. The other High Courts have also taken a similar view, namely that even if fraud is imputed to the decree-holder, the Court executing the decree cannot recognize an uncertified payment, and that the judgment-debtor cannot claim an extension of time under Section 18 of the Act.⁵ The reason is that Section 18 of the Limitation Act applies only to cases where a person has been fraudulently kept from the knowledge of his right to apply and does not deal with the exercise of the right to apply. Even if the decree-holder may be guilty of fraud, where the judgment-debtor does not avail himself of the procedure laid down in Order 21 Rule 2 sub-rule 2 of the Code, he must be content to seek his remedy in damages or elsewhere.⁶ Under such circumstances, the judgment-debtor can neither override the period of limitation provided by this Article, nor secure an investigation of the very same matter and an extension of time by invoking the terms of Section 47 of the Code of Civil Procedure.⁷

See also Note 5 to Section 18, *ante*.

Article 174 Note 7

Note 7

1. (1898) 21 Mad 356 (358), *Ramayyar v. Ramayyar*.
2. (1916) A I R 1916 Bom 217 (218) . 40 Bom 333 . 33 Ind Cas 232, *Hansa Godhaji v. Bhawa Jogaji*.
3. (1906) 29 Mad 312 (313) 16 Mad L Jour 33, *Ganapathy Iyer v. Chinna Chenga Reddi*.
- (1932) A I R 1932 Mad 372 (374) 55 Mad 720 : 137 Ind Cas 28 (F B), *Subramaniam v. Ramaswami*.
- (1935) A I R 1935 Mad 257 (257) . 152 Ind Cas 763, *Murugappa Chettiar v. Apparao Chettiar*.
4. (1925) A I R 1925 Bom 309 (310) 49 Bom 548 95 Ind Cas 687 (F B), *Mehbunnissa Begum v. Mehedunnissa Begum*.
[See also (1922) A I R 1922 Bom 880 (381) 46 Bom 226 64 Ind Cas 420, *E. Enas Pailoo Gharry v. K. Philip Gowrya*]
5. (1912) 18 Ind Cas 424 (425) (Cal), *Kutubullah Sarkar v. Durga Charan*.
(1912) 13 Ind Cas 63 (66) (Cal), *Buroo Gorain v. Janurat Koer*.
(1923) A I R 1923 Cal 342 (343) 50 Cal 468 . 76 Ind Cas 311, *Mukund Lal De v. Banshidar Marwari*.
(1915) A I R 1915 Cal 73 (73) 25 Ind Cas 884, *Golam Mujahar v. Goloke Charan*.
(1923) A I R 1923 Rang 103 (106) 68 Ind Cas 924, *P. R. P. L. Chetty Firm v. G. Lon Four*.
(1919) A I R 1919 Upp Fur 26 (27) 52 Ind Cas 958, *Maung On Mynt v. Maung Shue Pi*.
(1936) A I R 1936 Pat 270 (273) 162 Ind Cas 849 . 15 Pat 422, *Harthar Prasad v. Bhubneshwari Prasad*.
[See also (1925) A I R 1925 Nag 374 (375) 68 Ind Cas 48, *Maroti v. Narayan*]
6. (1936) A I R 1936 Pat 270 (273) 162 Ind Cas 849 15 Pat 422, *Harthar Prasad v. Bhubneshwari Prasad*.
7. (1938) A I R 1938 Pat 405 (406) 17 Pat 128, *Shashik Darsan Ali v. Suraj Mal*

Article 174
Note 8

8. Effect of bar.—If the judgment-debtor does not take steps to have the payment or adjustment certified within ninety days from the date on which the alleged payment or adjustment was made, it will not be open to him to prove it in the Court executing the decree. In other words, where an application under Rule 2 sub-rule 2 of Order 21 is barred by limitation, he will not be allowed to evade the provisions of this Article by securing an investigation of the same matter under Section 47 of the Civil Procedure Code, in execution proceedings.¹ Under the same circumstances, a suit for declaration that the decree has been satisfied and is consequently incapable of execution, is not maintainable.²

As to the remedy of the judgment-debtor in such cases, see Notes 29 and 30 under Order 21 Rule 2 of the Authors' Commentaries on the Civil Procedure Code.

Article 175

175.* For payment of the amount of a decree by instalments.	Six months.	The date of the decree.
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* Act of 1877

Same as above.

Acts of 1871 and 1859

No corresponding provision.

(1925) A I R 1925 Nag 374 (375) : 88 Ind Cas 48, *Maroti v. Narayan*.
(1910) 7 Ind Cas 55 (58) (Cal), *Mon Mohan v. Dwarakanath*.

Note 8

- (1934) A I R 1934 All 209 (210) : 56 All 694 : 148 Ind Cas 1118, *Murari Lal v. Raghubir Saran*.
- (1915) A I R 1915 Cal 73 (73) : 25 Ind Cas 884, *Golam Majahar Chowdry v. Golohe Charan*.
- (1925) A I R 1925 Lah 566 (567) : 87 Ind Cas 635, *Mul Chand Tadar Mal v. Mt. Champa*.
- (1931) A I R 1931 Lah 105 (106) : 131 Ind Cas 216 : 1931 Cri Cas 169 : 82 Cri L Jour 647, *Lachman Singh v. Emperor*.
- (1906) 29 Mad 312 (313) : 16 Mad L Jour 33, *Ganapathy Iyer v. Chenga Reddy*.
- (1921) A I R 1921 Pat 135 (137, 138) : 63 Ind Cas 535, *Radha Kant Lal v. Parbati Kuer*.
- 149 : 15 Pat 422, *Harihar aikh Darsan Ali v. Suraj Mal*.
- 67 Ind Cas 593 (F B), *Ram v. Dapanna*.

Synopsis

Article 175
Notes
1—3

1. Legislative changes.
2. Scope.
3. Effect of order on application made beyond six months.
4. Decree must be for payment of money.
5. Starting point.

1. Legislative changes.—This Article is the same as Article 175 of the repealed Act of 1877. There was no Article corresponding to this Article in the Act of 1871.

2. Scope.—Order 20 Rule 11 sub-rule 2 of the Civil Procedure Code provides that after the passing of decree *for the payment of money*, the Court may, on the application of the judgment-debtor with the consent of the decree-holder (in Madras, Nagpur, Rangoon and Sind, after *notice* to the decree-holder), order that payment of the amount decreed shall be *postponed* or shall be made *by instalments*.

This Article applies to applications under the said Rule for an order for payment of the decree by *instalments*. An application for an order for *postponement* of the payment of the decree is not within this Article.

3. Effect of order on application made beyond six months.—An application for payment of the amount of a decree by instalments will be in time if made within six months of the date of the decree or order.¹ By virtue of Section 3 *ante*, a Court cannot entertain such an application after the expiry of the six months prescribed by this Article. But, as has been seen in Note 19 to that Section, where a Court decides that an application is in time, the decision would operate as *res judicata* between the parties. Where an application such as is contemplated by this Article is actually entertained by the Court after the expiry of the period of six months and an order is passed allowing the application, the Court will be considered to have decided that the application was within time and the parties would be bound by such order.² The contrary view taken in some cases,³

Article 175 — Note 3

1 (1917) A I R 1917 Mad 188 (188) 34 Ind Cas 393, *Perumal Naicker v. Sheikh Dawood Rowther*

2 (1932) A I R 1932 All 273 (281) 54 All 573 138 Ind Cas 583 (F B), *Gobardhan Das v. Dan Dayal*

(1937) A I R 1937 Cal 236 (236, 237) 170 Ind Cas 767, *Manmohan Sanyal*

3 (1914) 1914 L J 100, *Durga Churn Goode*
(1914) 1914 L J 100, *Banarsi Das v. Ram-*

(1914) 1914 L J 100, *Banarsi Das v. Ananta Ram* (Dc)

3. (1924) A I R 1924 Lah 342 (343-344) 72 Ind Cas 477, *Banarsi Das v. Ram-*
zan

Article 175
Notes
3-6

namely, that the order is a nullity and is inoperative, does not seem to be correct.

4. Decree must be for payment of money.—Order 20 Rule 11 of the Civil Procedure Code applies only to a decree for the *payment of money*¹ and consequently the application that is governed by this Article must be one in reference to a decree for the payment of money and not in respect of a decree for sale on a mortgage.

5. Starting point.—Time, under this Article, runs from the *date of the decree*. The word “decree” would, where the decree of the original Court is appealed against, include the *appellate decree* also. In such a case, time will run from the date of the appellate decree whether it merely confirms the original Court’s decree or supersedes it.¹ Where, however, the appeal is not entertained at all, though filed, the original decree is and continues to be the subsisting and final decree or order for the purpose of limitation.² Similarly, the “date of the decree” will be the date of the original decree where a *review petition* is filed but it is dismissed.³

Article 176

176.* Under the same Code to have the legal representative of a deceased plaintiff or of a deceased appellant made a party.	Ninety days.	The date of the death of the deceased plaintiff or appellant.
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*	Act of 1877	
175 A. — Under section 365 of the Code of Civil Procedure by the legal representative of a deceased plaintiff, or under that section and section 582 of the same Code by the legal representative of a deceased plaintiff-appellant or defendant-appellant.	Six months.	The date of the death of the deceased plaintiff or of the deceased plaintiff-appellant or defendant-appellant.

Acts of 1871 and 1859
 No corresponding provision.

- (1887) 14 Cal 348 (350) . 11 Ind Jur 377, *Abdul Rahaman Sodagur v. Dullaram Marwari*.
 (1921) A I R 1921 Pat 340 (340) : 58 Ind Cas 893, *Gobardhan Prasad v. Bishunath Prasad*.
 [See also (1900) 1900 Pun Re No. 96 : 1901 Pun L R No. 23, *Nabi Baksh v. Gori Mal*.]

Note 4

1. See the Authors' Commentaries on the Code of Civil Procedure, Order 20 Rule 11 Note 2.

Note 5

1. (1932) A I R 1932 Rang 51 (55) : 135 Ind Cas 858, *Abdul Karim v. Maung San Kyaw*.
 2. (1916) A I R 1916 Mad 883 (886) : 28 Ind Cas 867 : 89 Mad 1196, *Venugopal Mudali v. Venkatasubbiah Chetty*.
 3. (1916) A I R 1916 Mad 883 (885, 886) : 89 Mad 1196 : 28 Ind Cas 867, *Venugopal Mudali v. Venkatasubbiah Chetty*.

Synopsis

Article 176
Notes
1—2

1. Legislative changes.
2. Scope of the Article.
- 2a. Death after preliminary and before final decree.
3. "Legal representative."
4. Onus of proof.
5. Starting point.
6. Extension and exclusion of time prescribed by this Article.
7. One representative applying within time — Another, if can be brought on record afterwards.

Other Topics

Applications in execution proceedings—Article not applicable See Note 2, Pt. 3
 Proceedings for ascertainment of mesne profits .. See Note 2, F.N (3)
 Rival claimants seeking to be brought on record . . . See Note 7, Pt. 2
 Section 6 not applicable to applications under this Article ... See Note 6, Pt. 2

1. Legislative changes.

1. Article 171 of Act XV of 1877 applied only to applications by the legal representatives of a deceased *plaintiff* and the period of limitation was sixty days.¹ By Act XII of 1879, the scope of the Article was extended so as to include applications by the legal representatives of deceased appellants also
- 2 By Act VII of 1888 the number of the Article was altered to 175 A and the period of limitation was extended to *six months*.
3. By Section 2 of the *Indian Limitation and Code of Civil Procedure (Amendment) Act, XXVI of 1920*, the period of limitation under this Article was reduced to ninety days

2. **Scope of the Article.** — Order 22 Rule 3 sub-rule 1 of the Code of Civil Procedure provides that where,

1. *one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs, or*
- 2 *a sole plaintiff or sole surviving plaintiff dies and the right to sue survives,*

an application can be made for making the legal representatives of such deceased plaintiff parties to the suit

Order 22 Rule 11 of the same Code provides that in the application of the Order to appeals, the word "plaintiff" includes "appellant"

Article 176 — Note 1

1. (1878) 3 Cal L R 440 (441), *In re Ram Sunder Bhadoory*.

Article 176

Note 2

This Article applies to applications to have the legal representatives of a deceased plaintiff or of a deceased appellant made parties to the suit or appeal, i. e., to applications under Order 22 Rule 3 read with Rule 11.

The Article does not apply to applications for substitution not made in the course of the suit or appeal.¹ Thus, it has no application to cases where the plaintiff dies after decree² or to applications made in execution proceedings.³ Nor does the Article apply where the deceased is neither a plaintiff nor an appellant, but merely an applicant for leave to appeal,⁴ or an assessee in a proceeding under Section 66 sub-section 2 of the Income-tax Act.⁵

There is a difference of opinion as to whether the rules as to the substitution of legal representatives contained in Order 22 apply to

Note 2

- [illegible]

appeals against orders in execution.⁶ On the view that they do apply, applications for substitution will be governed by this Article. Where the appellant has died before the appeal is dismissed for default, the legal representative's right to apply to be brought on record need not be exercised within the period limited by Article 168. The application can be made within the period prescribed by this Article.⁷

2a. Death after preliminary and before final decree. — See Note 5 to Article 177, *infra*

3. "Legal representative." — See Note 43 to Section 6 *ante*, and the undermentioned cases.¹

4. Onus of proof. — The onus is on the applicant to prove the date of the death of the deceased plaintiff or appellant, as the case may be, and that the application has been made within the period prescribed by this Article.¹

5. Starting point. — Time runs from the date of the death of the deceased plaintiff or appellant, and the period of limitation is ninety days from that date. This will be so even if the death occurred before the Amending Act 26 of 1920 came into force.¹

6. Extension and exclusion of time prescribed by this Article. — Section 5, *ante*, has no application to applications under

6 See the Authors' Commentaries on the Code of Civil Procedure, Order 22 Rule 12 Note 1.

7. (1913) 19 Ind Cas 526 (527). 16 Oudh Cas 194 : 40 Ind App 151 35 All 331 (P C), *Debi Bakhsh Singh v Habib Shah*,
(1891) 4 C P L R 183 (185), *Bhopatsingh v Gayaram*

Note 3

1 (1929) A I R 1929 Cal 26 (27) 115 Ind Cas 164, *Faqir Dango v Rahim Dux* (Dona fide application by all the representatives who are known and willing to join in the application is sufficient compliance with Order 22 Rule 3)

(1927) A I R 1927 Lah 94 (95) 100 Ind Cas 418, *Mahomed Hassan v Inayat Hussain* (The expression "legal representative" means and includes one person as well as several persons according as they represent the whole interest of the deceased person)

(1922) A I R 1922 Lah 175 (176), *Goor Dachan Singh v Gian Singh*, (Intermeddler may be representative and can be made a party in place of deceased)

[See also (1933) A I R 1933 Lah 356 (359) 14 Lah 543. 142 Ind Cas 649, *Chuni Lal Tuls Ram v Amin Chand*]

Note 4

1 (1867) 1857 All W N 60 (60), *Harnandan v Durga*.

Note 5

1 (1921) A I R 1921 Mad 650 (651) 62 Ind Cas 795, *Vaithinatha Iyer v. Gopindasamy Odayar*.

(1924) A I R 1924 Bom 416 (417) 50 Ind Cas 761, *Vijaya Singh v. Shrivaji Rao*.

Article 176
Notes
6—7

Order 22 Rules 3 and 11. But where no application under Rule 3 is filed and the suit abates, the representative may, under Order 22 Rule 9, apply to set aside the abatement on showing sufficient cause for not filing the application for substitution within time. An application after the time prescribed by this Article, to bring on record the legal representative of a deceased plaintiff or appellant was, in the undermentioned cases,¹ treated as one under Order 22 Rule 9 to set aside the abatement.

Section 6 of the Act is limited to applications *in execution* and does not apply to applications contemplated by this Article.²

7. One representative applying within time — Another, if can be brought on record afterwards.—Where one of two legal representatives has applied in time, to be made a party, and the application has been granted, the other legal representative may be brought on the record subsequently.¹

Where there are two *rival* claimants seeking to be brought on record, one claiming by inheritance and the other by bequest, the right to be brought on record vests in the one or the other with effect from the date of death of the deceased party. Limitation begins to run against both from that date and each will get barred by time at the expiry of the limitation prescribed by this Article. The one who has not applied to be brought on record within time cannot continue the suit revived by his rival's application in time.²

Article 177

177.* Under the same Code to have the legal representative of a deceased defendant or of a deceased respondent made a party.	Ninety days.	The date of the death of the deceased defendant or respondent.
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* Act of 1877		
175 C. — Under section 368 of the Code of Civil Procedure, to have the legal representative of a deceased defendant made a defendant, or under that section and section 582 of the same Code to have the legal representative of a deceased plaintiff-respondent or defendant-respondent made a plaintiff-respondent or defendant-respondent	Six months.	The date of the death of the deceased defendant or of the deceased plaintiff-respondent or defendant-respondent.

(1923) A I R 1923 Nag 166 (167) : 71 Ind Cas 176, *Nimba v. Mt. Janhi*.

Note 6

- (1928) A I R 1928 Lah 746 (747) : 112 Ind Cas 5, *Kirpa Ram v. Bhagat Chand*.
- (1924) A I R 1924 Lah 424 (424) : 74 Ind Cas 17, *Badlu v. Mt. Narami*.
- (1917) A I R 1917 Low Bur 192 (193) : 35 Ind Cas 438, *Ma Men Thin v. Maung Po Wm*.

Note 7

- (1912) 13 Ind Cas 313 (313) (Mad), *Venkata Rao v. Marikurthu Ammal*.
 (1933) A I R 1933 Rang 234 (234) : 145 Ind Cas 693, *Ahmad v. Mykeshnda B. B.*
- (1927) A I R 1927 Nag 343 (344) : 101 Ind Cas 398, *Amritdai v. Ratan Lal*.

Synopsis

Article 177
Note 1

1. Legislative changes.
2. Scope.
3. Execution proceedings.
4. Execution appeals.
5. Death after preliminary and before final decree.
6. Legal representative.
7. Extension of time.

Other Topics

Application for leave to appeal to Privy Council	...	See Note 2, Pt. 2
Application for leave to sue as pauper	...	See Note 2, Pt. 1
Revision application	...	See Note 2, Pt. 6
Two or more legal representatives	..	See Note 7, Pt. 5

1. Legislative changes. — This Article corresponds to Article 175C of the Act of 1877 and was inserted in that Act by Act VII of 1888. Article 175C made specific mention in the first column to Sections 368 and 582 of the Civil Procedure Code of 1882. Reference to provisions of the Code has been omitted from the Article in its present form. Before this Article was enacted in the Act of 1877, the general Article 178 was held to govern applications to bring on record the representatives of a deceased defendant or respondent.¹

Article 175C provided a period of six months.

The Indian Limitation and Civil Procedure Code (Amendment) Act XXVI of 1920 provided by Section 2 that "In the third division of the First Schedule to the Indian Limitation Act, 1908, in Articles 176, 178 and 179, for the word 'Ditto' in the second column, the words 'Ninety days,' 'Six months' and 'Ninety days' respectively shall be substituted." As no mention was made of Article 177 in this Section,

Acts of 1871 and 1859

No corresponding provision.

[See also (1926) 97 Ind Cas 142 (142) (Lab), *Gurdit Singh v Sawan Mal*

(1919) A I R 1919 Nag 150 (152) 15 Nag L R 21 • 49 Ind Cas 84, *Amolasao v. Govindrao*]

Article 177 — Note 1

- 1 (1888) 10 All 270 (271) . 1893 All W N 114 (F B), *Ram Sarup v. Ram Sa'ra..*
- (1888) 10 All 264 (267) . 1893 All W N 112 (F B), *Debi Din v Chunna Lal.*
- (1888) 10 All 260 (263) . 1893 All W N 111 (F B), *Chajmal Das v Jagadamba Prasad.*
- (1886) 9 Mad 1 (1) (F B), *Lakshmi v Sri Devi.*

Article 177
Notes
1—2

it was held by the High Courts of Lahore,³ Madras,³ Allahabad¹ and Patna⁵ that the Amending Act did not reduce the period of limitation under Article 177 and that it remained six months. The High Courts of Calcutta⁶ and Bombay⁷ took the opposite view. In view of this conflict of opinion the Legislature passed the Repealing and Amending Act XI of 1923, laying down definitely that the period of limitation under Articles 176, 177 and 179 is ninety days.

2. Scope.—Order 22 Rule 4 sub-rule 1 of the Code of Civil Procedure provides that where,

1. one of two or more *defendants* dies and the right to sue does not survive against the surviving defendant or defendants alone, or
2. a sole surviving defendant dies and the right to sue survives,

an application can be made for making the legal representatives of such deceased defendant parties to the suit.

Order 22 Rule 11 of the same Code provides that in the application of the Order to appeals the word “defendant” includes “respondent.” This Article applies to applications to have the legal representatives of a deceased defendant or a deceased respondent made a party to the suit or appeal, i. e., to applications under Order 22 Rule 4 read with Rule 11 of the Code.^{1a}

Where the deceased person is not a “defendant” in a suit or a “respondent” in appeal, Order 22 Rules 4 and 11 do not apply and consequently this Article also does not apply. Thus, it does not apply to an application to bring on record the legal representatives of a deceased opponent in an *application for leave to sue in forma*

2. (1925) A I R 1925 Lah 98 (98) : 78 Ind Cas 771, *Arjan Das v. Nanak Chand*.
 (1924) A I R 1924 Lah 65 (67) : 4 Lah 367 : 77 Ind Cas 409, *Gobind Das v. Rup Kishore*.
 (1922) A I R 1922 Lah 211 (213) : 69 Ind Cas 748, *Rup Kishore v. Bhagat Gobind Das*
3. (1926) A I R 1926 Mad 65 (66) : 92 Ind Cas 566, *Subramania Iyer v. Shanmugam Chettiar*.
4. (1925) A I R 1925 All 263 (264) : 47 All 335 : 86 Ind Cas 161, *Mumtaz ud-Daula Muhamarram Ali Khan v. James R. R. Skinner*.
 (1925) A I R 1925 All 77 (78) : 92 Ind Cas 330, *A. G. Skinner v. Muhamarram Ali Khan*.
5. (1927) A I R 1927 Pat 142 (143) : 97 Ind Cas 316, *Brinandan Prasad v. Mahabir Prasad*
6. (1924) A I R 1924 Cal 74 (79) : 50 Cal 549 : 75 Ind Cas 81, *Seodoyal Khemka v. Joharmal Manmull*
7. (1923) A I R 1923 Bom 209 (209) : 77 Ind Cas 474, *Museenuddin Nuruddin v. Dulalshidas Kesharlal*.

Note 2

- ^{1a}(1931) A I R 1931 Pat 164 (166) : 10 Pat 341 : 132 Ind Cas 100, *Waleyatunnissa Begam v. Chalakhi*.

pauperis,¹ or for leave to appeal to the Privy Council,² or of a person who is dead before the institution of a suit, but whose name appears as a defendant in the suit.³ Nor does the Article apply when a defendant dies after decree.⁴ But the Article applies to applications to make the legal representatives of a deceased respondent in *second appeal* parties to the appeal.⁵

A *revision* application is not a 'suit' or 'appeal.' There cannot be any question of abatement in such applications, the whole theory of abatement being inapplicable to such applications and hence the provisions of Order 22 do not apply to them.⁶

The Limitation Act does not apply to proceedings under the Companies Act 1913 and where the respondent in an application for an order for the balance of contributions dies, it is not necessary to bring his legal representatives on record within the time prescribed by this Article.⁷

3. Execution proceedings. — Order 22 Rule 12 of the Civil Procedure Code specifically declares that Order 22 Rule 4, *inter alia*, does not apply to execution proceedings. This Article will not govern the case of death of a defendant or respondent in *execution proceedings* and an application for substitution in such proceedings need not

1 (1929) A I R 1929 Sind 136 (136) 116 Ind Cas 111, *Khatijabai v. Nur Muhammad*.

(1929) A I R 1929 Mad 278 (279) 51 Mad 697 : 110 Ind Cas 318, *Subbiah v. Bala Tirupura Sundra*.

(1906) 23 Cal 1163 (1165) 4 Cal L Jour 234, *Lalit Mohan v. Satish Chandra* (1863) 7 Bom 373 (376), *Janardan Vithal v. Anant Mahadei*.

2 (1934) A I R 1934 Sind 36 (37, 38) 148 Ind Cas 819 28 Sind L R 150, *Noor Ahmed v. Chattomal*.

3 (1907) 31 Mad 86 (88) 17 Mad L Jour 551 3 Mad L Tim 12, *Veerappan Chetty v. Tindal Ponnen*.

(1919) A I R 1919 Cal 257 (258) 51 Ind Cas 160, *Krista Das Law v. Khirada Kanta Roy*.

[See also (1914) A I R 1914 Cal 695 (596) 24 Ind Cas 112, *Bejoy Chand v. Anulya Charan*.]

4. (1881) 3 Mad 236 (238), *Ramanada Sastri v. Minachi Ammal*.

(1904) 28 Mad 361 (362), *Sambasiva Chetty v. Veera Perumal Mudaly*.

5 (1904) 28 Mad 493 (499) 15 Mad L Jour 404, *Narasimham v. Mohamud Falsullah*.

(1907) 29 All 535 (536) 4 All L Jour 397 1907 All W N 155, *Madhuban Das v. Naram Das*.

(1908) 10 Bom L R 509 (513), *Sheikh Adam v. Balaji Krishnaji*.

(1907) 34 Cal 1020 (1023) 11 Cal W N 1100 : 6 Cal L Jour 715, *Upendra Kumar Chakravarti v. Sham Lal Mondol*.

point JJ

6 (1920) A I R 1920 Sind 120 (120) 80 Ind Cas 456 (457), *Baksho v. Piaro*.

7. (1938) A I R 1938 Pat 287 (288) : 173 Ind Cas 893, *Sumitra Kuer v. Sita-marshi Sugar Works Ltd.*

Article 177
Notes
3—5

be made within the time prescribed by this Article.¹ The proper course in such cases is to apply for execution against the legal representatives themselves.² It has, however, been held in some cases that when a judgment-debtor dies, the decree-holder should get, on the analogy of this Article, the period at least prescribed by it for applying to bring his legal representatives on the record.³

4. Execution appeals. — There is a difference of opinion as to whether the rules as to substitution of legal representatives contained under Order 22 apply to appeals against orders in execution.¹ On the view that they do apply, applications for substitution of the legal representatives of a deceased defendant or respondent will be governed by this Article.²

5. Death after preliminary and before final decree. — In suits requiring a preliminary and a final decree, can there be an abatement on the ground that no application was filed in time to implead legal representatives on the death of a plaintiff or of a defendant after the preliminary, but before a final decree? It was

Note 3

1. (1932) A I R 1932 Pat 222 (223) : 11 Pat 546 : 138 Ind Cas 91, *Sheo Gobind Ram v. Mt. Kishunbansi Kuer*.
- (1924) A I R 1924 Lah 316 (318) : 73 Ind Cas 987, *Wahid Baksh v. Lalla Parshad*.
- (1911) 10 Ind Cas 405 (406) (Lah), *Amolak Ram v. Shanu Ram*.
- (1929) A I R 1929 Pat 200 (200) : 117 Ind Cas 165, *Bimbadhar Panda v. Abdul Zahid*.
- (1937) A I R 1927 Mad 184 (184) : 50 Mad 1 : 99 Ind Cas 627, *Palaniappa Chetti v. Valliammai Achi*.
- (1923) A I R 1923 Lah 560 (563) : 74 Ind Cas 577, *Mir Khan v. Sharfu Punnun*.
- (1879) 8 Bom 221 (222) : 4 Ind Jur 34, *Gulabdas v. Lakshman Narhar*.
- (1880) 5 Bom 29 (37), *Kalyanbhai Dipchand v. Ghanasham Lal*.
2. (1905) 2 Cal L Jour 544 (545, 546), *Jogendra Nath Roy v. Rasik Chandra Banerji*.
- (1914) A I R 1914 P C 129 (131) : 42 Cal 72 : 41 Ind App 251 : 24 Ind Cas 304 (P C), *Raghunath Das v. Sunder Das Khetri*.
- (1920) A I R 1920 All 171 (172) : 42 All 570 : 57 Ind Cas 610, *Bhagwan Das v. Jugal Kishore*.
- (1909) 1 Ind Cas 163 (174) : 36 Cal 543, *Jogendra Chandra Roy v. Shyam Das*.
3. (1921) 62 Ind Cas 52 (53) (Pat), *Rameshar Singh v. Mathu Misir*.
- [See also (1882) 1882 Pun Re No. 151, *Mt. Azubbi v. Ganda Mal*. (Application for substitution of the legal representative of a deceased judgment-debtor is in substance an application for execution within S. 234, O. P. C of 1882 and Art. 179, Limitation Act of 1877.)]

Note 4

1. See Note 1 to O. 22 R. 12 of the Authors' Commentaries on the Civil Procedure Code.
- 2 (1934) A I R 1934 Mad 664 (664) : 151 Ind Cas 777, *Gangu Naidu v. Muttinna*.

held in the undermentioned cases¹ by the High Court of Allahabad that the suit would abate, the reason being that a suit is "pending" till a final decree is passed. The said Court did not accept the position that the principle laid down by the Privy Council in *Lachmi Narain v. Balmakund*, I. L. R. 4 Patna 61, was applicable to such cases. In order to avoid this difficulty, Order 22 Rule 12 has now been amended by that Court so as to make Rules 3, 4 and 8 inapplicable to proceedings after the preliminary decree.^{1a}

All the other High Courts are agreed on the authority of the said Privy Council decision that the Rule does not apply to such cases and that there can be no abatement on death after a preliminary, and before a final decree.²

6. "Legal representative."—As to the meaning of the expression "Legal Representative," see Note 43 to Section 6 *ante* and Notes to Order 22 Rules 3 and 4 of the Authors' Commentaries on the Civil Procedure Code.

7. Extension of time.—Under Section 368 of the Civil Procedure Code 1882, an application for substitution could have been made beyond the period of six months prescribed by Article 175 C, if there was sufficient cause for the delay.¹ But under Order 22 Rule 4 of the present Civil Procedure Code, if no application for substitution

Note 5

- 1 (1930) A I R 1930 All 779 (182, 783) 126 Ind Cas 20 : 52 All 910, *Anmol Singh v. Hari Shankar Lal*.
 (1922) A I R 1922 All 396 (397) 68 Ind Cas 251, *Jagannath Umar v. Ramkaran Singh*.
The same view was also taken by the Sind Court in the undermentioned case:
 (1926) A I R 1926 Sind 20 (21) 89 Ind Cas 238, *Tulsi Dass Keshao Das v. Ramzan Abdulla*.
 1a (1934) A I R 1934 All 465 (468) 151 Ind Cas 755, *Naram Das v. Bhagwati Prasad*.
 2 (1933) A I R 1933 Rang 318 (319) : 11 Rang 446 147 Ind Cas 730, *Muthiah Chettiar v. Tha Zan Hla*.
 (1929) A I R 1928 Mad 914 (918) : 112 Ind Cas 116 : 51 Mad 701 (F B), *Perumal Pillai v. Perumal Chetty*.
 (1929) A I R 1929 Cal 648 (649) 125 Ind Cas 287, *Mohan Sardar v. Hem Chandra*.
 (1928) 120 Ind Cas 77 (77) (Mad), *Peetha Suamigadu v. Ramachandrayya*.
 (1929) A I R 1929 Nag 206 (207) 122 Ind Cas 447, *Debinath v. Bissesar Das*.
 (1929) A I R 1929 Nag 142 (144) 116 Ind Cas 657 : 27 Nag L R 119 (F B), *Dapu v. Gulabchand*.
 (1927) A I R 1927 Oudh 561 (561) 106 Ind Cas 332, *Kalu Ram v. Gaya Din*.
 (1927) A I R 1927 Oudh 156 (157) 101 Ind Cas 174 : 2 Luck 464, *Mt. Lalhpati Kuer v. Daulat Singh*.
 (1921) A I R 1921 Nag 32 (33) 17 Nag L R 81 : 64 Ind Cas 307, *Tularam v. Tularam*.
 (1930) A I R 1930 Lah 329 (330) 122 Ind Cas 227, *Rahim Baksh v. Walait Ram*.

Note 7

1. (1880) 11 All 408 (414) 1888 All W N 111 (F B), *Chajmal Das v. Jagdamba Prasad* (Held, sufficient cause within S. 368 was not shown)

Article 177
Note 7

is made within the period of ninety days from the death of the defendant or respondent, the suit or appeal abates and the Court has no power to enlarge the time for sufficient cause. Section 5 of the Limitation Act does not apply.² But after abatement, it is open to the plaintiff or appellant to make an application to set aside the abatement under Order 22 Rule 9, and the Court can, on sufficient cause being shown for not applying in time for substitution, extend the time.

An application made to bring the legal representatives of the deceased defendant on record after the time prescribed therefor, may be treated as an application to set aside the abatement, and on proof of sufficient cause for delay, the application may be granted.³

Section 6 of the Limitation Act does not apply to an application under Article 176 or Article 177 and hence the period of ninety days cannot be enlarged by reason of the applicant's minority.⁴

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- (1907) 29 All 535 (537) : 4 All L Jour 397 : 1907 All W N 155, *Madhuban Das v. Narain Das*
 (1887) 1887 Pun Re No. 42, *Gaman v. Baksha*.
 (1907) 1907 Pun Re No. 113 : 1907 Pun W R 194, *Dadu v. Kadu*.
 (1903) 7 Cal W N 529 (531), *Syed Hossein Ali v. Abdur Rahim*.
 2. (1922) A I R 1922 Lah 131 (131) . 65 Ind Cas 121, *Shah Muhammad v. Karam Allah*.
 (1914) A I R 1914 All 94 (95) . 36 All 235 . 25 Ind Cas 48, *Secretary of State v. Jawahir Lal*.
 3. (1928) A I R 1928 Lah 746 (747) : 112 Ind Cas 5, *Kirpa Ram v. Bhagat Chand*.
 (1924) A I R 1924 Lah 424 (424) : 74 Ind Cas 17, *Badli v. Mt Naraini*.
 (1933) A I R 1933 Lah 916 (920) : 149 Ind Cas 1187, *Sham Das v. Mahabir Das*.
 (1934) A I R 1934 Lah 315 (315) : 147 Ind Cas 699, *Bhartu v. Udmi*.
 (1929) A I R 1929 Lah 129 (130) : 117 Ind Cas 884 : 10 Lah 816, *Dina Nath v. Sayad Habib*.
 (1933) A I R 1933 Nag 85 (86, 87) : 29 Nag L R 118 : 144 Ind Cas 368, *Gabrial Firm v. Court of Wards, Bilaspur*.
 (1926) A I R 1926 Lah 474 (475) : 94 Ind Cas 300, *Ataur Rahman v. Mushkur-un-nissa*. (Where it was found that there could not in fact be any reason for applicant to ask for excuse and there was no assertion that there had been delay due to reasonable cause. Held, the application could not be treated as one under R. 9.)
 (1937) A I R 1937 Lah 455 (457) . 174 Ind Cas 700, *Duanchand Nirmal v. Bhagwan Chand*.
 (1920) A I R 1920 Sind 82 (83) . 78 Ind Cas 569, *Manager, Encumbered Estates in Sind v. Tharumal*.
 [See also (1916) A I R 1916 Mad 440 (441) . 30 Ind Cas 679, *Arunachalam Chettiar In re*.
 (1892) 16 Mad 319 (320), *Mallikarjuna v. Pullayya*.]
 4. (1917) A I R 1917 Low Bur 132 (133) . 35 Ind Cas 433, *Ma Mun Thin v. Maung Pa Win*.
 (1912) 15 Ind Cas 366 (367) : 6 Low Bur Rul 52, *Ma Sein Hnyun v. Lutchman Chetty*.
 (1901) 23 Mad 359 (360), *Paru v. Raman Menon*.
 (1895) 1895 Pun Re No. 91, *Rihana v. Harditta*.

If one of the representatives of the deceased defendant or respondent is brought on record in time, there is no bar to bring the other representatives on record subsequently.⁵

Article 177
Note 7

178. Under the same Code for the filing in Court of an award in a suit made in any matter referred to arbitration by order of the Court or of an award made in any matter referred to arbitration without the intervention of a Court.	Six months.	The date of the award.	Article 178
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "Award."
4. Starting point.
5. Extension of time.

1. Legislative changes.

- 1 The Act of 1859 did not apply to applications. But Section 327 of the Code of Civil Procedure 1859 provided that an application to file an award should be made within 6 months of the award¹

* Act of 1877		
176 —Under the Code of Civil Procedure, section 516 or 525, that an award be filed in Court	Six months	The date of the award

Act of 1871

165 —Under the Code of Civil Procedure, section three hundred and twenty-seven, that an award be filed in Court.	Six months	The date of the award
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Act of 1859

No corresponding provision

5. (1912) 13 Ind Cas 313 (313) (Mad), *Venkata Row v. Marikruthu Ammal* (1926) A I R 1926 Pat 276 (276) 94 Ind Cas 209, *Sadu Saran Pandé v. Nanda Kumar Singh*

Article 178 — Note 1

- 1 (1865) 5 Suth W R 123 (123), *Dhyrub Jha v. Hunnoman Dutt Jha*

of the Schedule would clearly be covered by the second portion of the first column of the Article.

The Article applies only to *applications* to file an award. A party in whose favour an award is made has two remedies open to him. He may make an application to file the award in Court in which case this Article will apply. He may also institute a suit for that purpose. This Article has no application to such suits.³

3. "Award."—An award must be a single instrument complete in itself.^{1a}

Where the agreement to refer provides that the matter in dispute may be taken up and dealt with *seriatim*, and the award delivered bit by bit, a portion so decided may be taken as a distinct award.¹ An award filed without the intervention of the Court can be split up and need not be filed as a whole.² When the order filing the award and the order passing a decree in terms of it are contained in the same order, the two parts can be separated and it has been held that though there may be no appeal against the decree, an appeal can be filed against the earlier portion of the order directing the filing of the award.³

An award does not become invalid merely because it has not been made a rule of Court within the prescribed period of limitation.⁴

4. Starting point.—Time, under the Article, runs from the *date of the award*. The "date of the award" is the date when the award is published or delivered to the parties so that they may have notice of its contents and not the date when it was actually written and signed, which in many cases might be much earlier.¹ A party applied in time to file an award made without the intervention of the Court, but prayed that a decree might be granted after excluding certain

3. (1935) A I R 1935 Lah 134 (184), *Ratan Chand v. Rup Lal*.

(1909) 4 Ind Cas 821 (822) (1907-09) Upp Bur Rul Lum p. 9, *M. Le Byu v. Nga Chit Pu*.

(1923) A I R 1923 Rang 108 (109). 70 Ind Cas 517 4 Upp Bur Rul 124, *Maung Ne Dun v. Maung Cho*.

Note 3

1a (1869) 12 Suth W R 397 (400) : 8 Beng L R 319n, *Joy Mungal Singh v. Mohan Ram*.

1. (1879) 4 Cal L R 92 (93), *Sm. Shoshemukhi Debia v. Nobin Chunder Roy*.

2. (1929) A I R 1929 Bom 193 (195) 117 Ind Cas 523, *Kashinath Mahader v. Gangubai Keshai*.

3. (1928) A I R 1928 Mad 969 (971) : 113 Ind Cas 691, *Sekarayan Samson v. Amalorpananadam*.

4. (1930) A I R 1930 Oudh 51 (51) : 124 Ind Cas 448, *Thakur Din Singh v. Bhagwan Din Singh*.

Note 4

1. (1874) 21 Suth W R 248 (248), *Sreenath Chatterjee v. Kylash Chunder Chatterjee*.

(1883) 9 Cal 575 (578), *Duttio Singh v. Desad Bahadur Singh*.

(1918) A I R 1918 Pat 83 (90) . 4 Pat L Jour 394 48 Ind Cas 711, *Kunj Lal v. Banwar Lal*.

Article 178
Notes
4—5

items of the award, on the ground of fraud practised on the arbitrators. On objection by the other side, that a part of the award cannot be filed, the party made a second application praying that the prayer in the original application for exclusion of certain items may be deleted. This application was more than six months of the date of the award. It was held that the original application was a valid application to file the award and was made in time, and that the subsequent application to amend the prior one, though beyond six months of the award, did not affect the validity of the prior application.²

5. Extension of time.—Time, under this Article, cannot be extended by reference to Section 5 *ante* as that Section applies only to certain specified applications and does not cover an application to file an award.¹

Section 6 *ante* applies only to suits and applications *for execution* and therefore does not apply to applications to file awards.³

Section 14 may, however, apply to such applications and the time spent *bona fide* in infructuous proceedings in a wrong Court may be excluded in computing the period of limitation prescribed by this Article.³

Article 17

179.* By a person desiring to appeal under the same Code to His Majesty in Council for leave to appeal.	Ninety days.	The date of the decree appealed from.
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Synopsis

1. History of the Article.
2. Scope.
3. Starting point.
4. Extension of time.

* Act of 1877

177.—For the admission of an appeal to Her Majesty in Council.	Six months.	The date of the decree appealed against.
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Acts of 1871 and 1859

No corresponding provision.

² (1936) A I R 1936 Lah 682 (653) : 164 Ind Cas 543, *Bimal Pershad v. Satat Pershad*.

Note 5

1. (1915) A I R 1915 All 369 (371) . 38 All 85 . 31 Ind Cas 699, *Ram Ugrah Pande v. Achray Nath Pande*.
- (1936) A I R 1936 Pat 161 (162) : 14 Pat 855 : 161 Ind Cas 691, *Panchs Mandal v. Gena Mander*.
2. (1923) A I R 1923 Rang 226 (226) : 1 Rang 256 : 76 Ind Cas 493, *Ma Thein Tin v. Maung Ba Than*.
3. (1911) 9 Ind Cas 157 (159) (Mad), *Anjayya v. Bapaya*.

*Other Topics***Article 179.****Notes
1—2**

Amendment and review of decree—Effect	...	...See Note 3, Pts. 2, 3
Exclusion of time under Section 5	...	...See Note 4, Pts. 3, 4
Leave to appeal in criminal cases—Article not applicable	...	See Note 2, Pt. 4
Time for copies	..	..See Note 4, Pts. 5, 6

1. History of the Article.—There was no Article corresponding to this in the Act of 1871. Section 599 of the Code of Civil Procedure of 1877 provided that an application for leave to appeal to Her Majesty in Council must ordinarily be made within six months from the date of the decree complained of. By Section 2 of the Limitation Act XV of 1877, Section 579 of the Code of 1877 was repealed and by Article 177 all applications “for the admission of an appeal to Her Majesty in Council” had to be filed within six months of the date of the decree appealed against. The Civil Procedure Code of 1882 (Act XIV of 1882) however, re-enacted Section 599 of the Code of 1877 and the view was expressed in one case¹ that such re-enactment operated as a repeal of Article 177 of the Act of 1877. A contrary view was also expressed in the undermentioned case². By Section 57 of Act VII of 1888, Section 599 of the Code of 1882 was repealed and the conflict of views as to the applicability of Article 177 of the Limitation Act to applications for leave to appeal to the Privy Council was thereby removed.

The first column of the present Article follows more or less the wording of Order 45 Rule 2 of the Code of Civil Procedure, 1908, which runs as follows :

“Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of.”

As the Article stood originally, the period of limitation was six months. By Act 26 of 1920 the period of limitation was altered to ninety days.

2. Scope.—This Article applies to applications for leave to appeal to His Majesty in Council. Under Order 45 Rule 2 of the Civil Procedure Code, a person desiring to appeal to His Majesty in Council from a *decree or final order* passed by any Court must make an application to such Court for leave to appeal¹. This procedure has been made applicable also to certain orders passed under Special Acts. Thus, the procedure has to be followed in appeals to His Majesty in Council from the judgment of the High Court under section 66 of the Indian Income-tax Act, 1922, and the party desirous of appealing

Article 179 — Note 1

- (1884) 6 All 250 (251) 1884 All W N 71 (F B), *Fazul-un-nissa Begam v Mulo*
- (1892) 15 All 14 (16, 17) 1892 All W N 152, *In the matter of Petition of Sita Ram Kesho*.

Note 2

- (1875) 15 Beng L R 221 (223) 2 Ind App 205 3 Suther 148 3 Sar 495 (P C), *Gajadhar Pershad v Widows of Enam Ali Beg* (Granting of leave on application for review without application for leave was held *ultra vires*).

Article 179
Notes
2—3

from such judgment has to file an application for leave to appeal. This Article will apply to all such applications.²

Where there are two appeals from two decrees though they are decided by one judgment, a party desiring to appeal from both decrees must file two separate applications for leave to appeal within the period prescribed by this Article. Where in such a case a single application only was filed within time asking for leave to appeal against both the decrees, it was held that such application was bad in law. The High Court, however, allowed the applicant to amend his application by restricting his prayer to one decree.³

*The Article applies only to applications for leave to appeal made under the Code of Civil Procedure. It has no application to an application for leave to appeal in criminal cases.*⁴

Order 22 of the Civil Procedure Code does not apply to applications for leave to appeal and no question of limitation arises on the death of the applicant, any order for substitution being, however, subject to the rules of the Judicial Committee and such directions as may be given by their Lordships at the hearing of the appeal.⁵

3. Starting point.—Time, under this Article, runs from the *date of the decree*. As has been seen in Note 5 to Article 156 *ante*, the date of the decree is the date of the *judgment* and not the date on which the decree is actually drawn up and signed.¹

The *amendment* of the decree which does not have the effect of substituting a *new judgment* does not give a fresh starting point of limitation or alter "the date of the decree" as originally drawn up.² But a decree passed on *review* is a fresh decree and time for an application for leave to appeal runs from the date of the fresh decree.³ Where the High Court sends down an issue for finding of

2. (1932) A I R 1932 Cal 587 (587) : 59 Cal 251 : 189 Ind Cas 236, *Commissioner of Income-tax, Bengal v. M. Shaw Wallace & Co*

3. (1932) A I R 1932 Lah 441 (442) : 140 Ind Cas 70, *Gopal Singh v. Mrs. N. Johnstone*.

[See also (1920) A I R 1920 Pat 267 (270) : 57 Ind Cas 312, *Mahadeo Prasad v. Gajadhar Prasad*.]

4. (1924) A I R 1924 Cal 338 (341) : 25 Cri L Jour 1371 : 82 Ind Cas 763, *Phillip E. Billingham v. Emperor*.

5. (1910) 4 Ind Cas 454 (456) (Cal), *Jadunandan Koer v. Ramjiban Lal*.

Note 3

..... *Case Debi*.

.....
Rabbani.]

..... *ud-Din v. Gulam*

2. See Note 8 to Article 156, *ante*, for a fuller discussion.

[See also (1899) 2 Oudh Cas 235 (239), *Zinat Bibi v. Jehangir Dukhsh Khan*.]

3 See Note 9 to Article 156, *ante* for a full discussion.

[See also (1924) A I R 1924 Lah 82 (82) : 4 Lah 185 : 75 Ind Cas 520, *Naras Ali v. Allu*.

(1931) A I R 1931 Cal 823 (826) : 131 Ind Cas 253, *Aditya Kumar v. Abinash Chandra*.]

the lower Court under Order 41 Rule 25 of the Civil Procedure Code and passes a decree on receipt of the finding, the order sending down the issue is not the final order and an application for leave to appeal can be made within ninety days of the final decree.⁴

4. Extension of time.

Extension under Section 4 :—Where the Court is closed on the last day prescribed for the application, it may be presented on the next re-opening day, by virtue of Section 4, *ante*.¹

Extension under Section 6 :—Section 6, *ante*, does not apply to applications contemplated by this Article and the period of limitation prescribed therefor cannot be extended by reason of any legal disability.²

Exclusion under Section 5 :—Section 5 sub-section 2 of Act of 1877 does not apply to applications for leave to appeal to His Majesty in Council. It was accordingly held that time cannot be extended under this Section even if there was sufficient cause for the delay.³ This sub-section has now been amended in the present Act so as to make it applicable to applications for leave to appeal. As to the circumstances under which time may be extended under Section 5, see Notes to that Section and the undermentioned cases.⁴

Exclusion under Section 12 :—Section 12 sub-section 2 of Act of 1877 does not apply to the applications contemplated by this Article and it was held that the applicant was not entitled to the exclusion of the time requisite for obtaining a copy of the decree

4. (1933) A I R 1933 Bom 251 (252) : 145 Ind Cas 258, *Jivan Lal Vrajrao v. Vrajlal Pochalal*

Note 4

1. (1871) 15 Suth W R 255 (256), *Rajah Raj Kishen Singh v. Huro Soonduree Dossee*
- (1869) 12 Suth W R 293 (294), *Luchmun Chunder Gir v. Kalee Churn Singh*
[But see (1868) 1 Beng L R O C 39 (40), *Tamtaco v. Skinner* (Six months' period expiring during holidays—Application made on the re-opening day—Leave not granted)]
2. (1891) 18 Mad 484 (486), *Thurai Rajah v. Jamilabdeen Routhan*.
(1918) A I R 1918 Oudh 163 (166) 46 Ind Cas 68, *Narendra Bahadur Singh v. Oudh Commercial Bank of Fyzabad*
3. (1892) 15 All 14 (19) 1892 All W N 152, *In the matter of petition of Sita Ram Kesho*
(1906) 28 All 391 (392, 393) 1906 All W N 55 3 All L Jour 165, *Shib Singh v. Gandharp Singh*.
(1895) 19 Bom 801 (302), *Moroba Ramchandra v. Ghanasham Nulkant*
4. (1923) A I R 1923 All 536 (537) 76 Ind Cas 375, *Deo Indar Singh v. Khushi Ram* (Sudden illness)
(1924) A I R 1924 Bom 399 (407, 410) 48 Bom 442 80 Ind Cas 862 (F B), *Nagindas Motilal v. Nilaji Moroba* (Mistaken advice of pleader and acting in good faith.)
(1921) A I R 1921 Pat 175 (176) 6 Pat L Jour 350 62 Ind Cas 649 (F B), *Jyotindranath Sarkar v. Lodna Colliery Co Ltd.* (Being misled by the longstanding practice of Court.)
(1929) A I R 1929 Sind 206 (207) 118 Ind Cas 212 24 Sind L R 103, *Jhamandas v. Mt Bibi Aishan*. (Negligence of party—Time cannot be extended.)

Article 179
Note 4

appealed from.⁵ This sub-section has also been amended in the present Act so as to make it applicable to applications for leave to appeal. But it is only the time requisite for obtaining a copy of the decree appealed against that can be excluded in computing the period prescribed by this Article.⁶ There is a conflict of opinion as to whether the time requisite in obtaining the copy of the judgment can be excluded in computing such period. See Notes 28 and 25 to Section 12, *ante*.

Article 180

180. By a purchaser of immoveable property at a sale in execution of a decree for delivery of possession.	Three years.	When the sale becomes absolute.
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Synopsis

1. Legislative changes.
2. Scope of the Article.
3. "By a purchaser."
4. Starting point.
5. Extension and exclusion of time.
6. Second application.

1. Legislative changes. — This Article was introduced for the first time in 1908. Before the 1908 Act it had been held that applications under S 318 of the Code of 1882 corresponding to the present

- (1925) A I R 1925 Bom 137 (187) : 4 *Rustomji Mehta v Hasham* I limitation for an application for the time taken up for review against should be excluded.)
- (1925) A I R 1925 Cal 253 (254) . 80 Ind Cas 786, *Kailash Chandra Nag v. Bejoy Chandra Nag*. (Do.)
- (1924) A I R 1924 Lah 225 (226) . 77 Ind Cas 869 : 4 Lah 445, *Nehi v. Chajju Ram*.
5. (1877) 1 All 644 (647), *Jawahir Lal v. Narain Das*
(1906) 28 All 891 (392, 393) : 1906 All W N 55 : 8 All L Jour 165, *Shub Singh v. Chandarp Singh*.
(1895) 19 Bom 801 (302), *Moroba Ramchandra v. Ghanasham Nilkant*.
(1887) 10 Mad 873 (377), *Lakshmanan v. Peryasamy*.
(1892) 15 Mad 169 (169), *Anderson v. Pervasami*.
6. (1915) A I R 1915 All 335 (336) : 38 All 82 : 31 Ind Cas 906, *Ram Sarup v. Jaswant Rai*.
(1914) A I R 1914 Cal 679 (681) : 42 Cal 35 : 24 Ind Cas 273, *Abdullah Hussain v. Ananda Chandra Roy*.
(1928) A I R 1928 Nag 63 (61) : 105 Ind Cas 852 . 24 Nag L R 97, *Gulab-chany v. Ghulab Singh*.

[See however (1935) A I R 1935 Lah 341 (341) : 158 Ind Cas 120, *Hari Ram v. Prem Nath*. (It was held that if decree is not necessary to be filed, then no exclusion will be made for obtaining the copy—This is not correct—See Note 7 to Section 12, *ante*)]

Rule 95 of Order 21, were governed by Article 178 of the Act of 1877 corresponding to the present Article 181, and that time for such applications ran from the date when the certificate of sale was granted.¹ In the undermentioned case² it was held that time ran from the *confirmation* of the sale. It was also held by the High Court of Calcutta in a case under Section 319 of the old Code that it was the duty of the Court to order symbolical delivery of possession and that there was no period of limitation for delivery of such possession.³

The insertion of the words "on the application of the purchaser" in Rules 95 and 96 of Order 21 of the Code and the enactment of this new Article have made it clear that such applications should be made within three years from the date when the sale becomes absolute.

2. Scope of the Article. — This Article governs an application made under Order 21 Rules 95 and 96 of the Code of Civil Procedure, by a purchaser of immovable property at a sale in execution of a decree for delivery of possession.

It, however, applies only to *applications*. A *suit* for the same relief is governed, for purposes of limitation, by Article 138 *ante*. Where the purchaser is a stranger, he is not bound to apply under Order 21 Rule 95, but may institute a suit for possession for which the period of limitation is prescribed by Article 138.¹ But there is a conflict of opinion as to the maintainability of the suit when the decree-holder is himself the auction-purchaser. According to the High Courts of Madras,² Calcutta,³ and the Courts of the Judicial

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Notes
1—2

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- 1 (1879) 3 Bom 433 (436) 4 Ind Jur 187, *Basapa v. Marja*.
(1894) 8 Bom 237 (258) 8 Ind Jur 578, *Hanmantrav Pandurang v. Subaji*
(1892) 17 Bom 228 (229), *Kashinath Trimbal v. Duming Zuran*
(1909) 1 Ind Cas 993 (999) 32 Mad 186, *Sultan Sahib Marakayar v. Chidambaram Chettiar*
- 2 (1908) 30 All 390 (392) 5 All L Jour 516 1908 All W N 162, *Ranjit Singh v. Baldeo Singh*
3. (1918) A I R 1918 Cal 545 (546) 40 Ind Cas 605 (606), *Harish Chandra Roy v. Sarat Chandra*

Note 2

Bhagoban Din Pandey
Chunder Nath Pal
126 Ind Cas 849, *Ram Kumar*

- (1931) A I R 1931 Pat 241 (253) 133 Ind Cas 337 . 10 Pat 670 (F B), *Triveni Prasad v. Ramasray Prasad*
- 2 (1939) A I R 1939 Mad 569 (570) 144 Ind Cas 472, *Mahomed Routhier v. Maideen Pichai Sahib*
(1927) A I R 1927 Mad 283 (290) 50 Mad 403 99 Ind Cas 677, *Kannan v. Attulla Haji*
(1901) 25 Mad 529 (532) 12 Mad L Jour 1, *Kasinatha Ayyar v. Uthumansa Northan*
(1904) 28 Mad 87 (89) 14 Mad L Jour 474, *Sandhu Taraganar v. Hussain Sahib*
(1902) 26 Mad 740 (741) 13 Mad L Jour 237, *Kattayat Pathumaya v. Raman Menon*.
3. (1926) A I R 1926 Cal 798 (802) 53 Cal 781 . 95 Ind Cas 494 (F B), *Kailash Chandra v. Gopal Chandra*.

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Notes
2—3

Commissioners of Nagpur⁴ and Sind,⁵ a question relating to delivery of possession is one relating to the execution, discharge or satisfaction of the decree, and hence where the decree-holder purchases the property in court-auction, his remedy for recovery of possession is only by way of an application contemplated by Article 180 and a separate suit will not lie. The High Courts of Allahabad,⁶ Bombay,⁷ Patna,⁸ Lahore⁹ and Rangoon,¹⁰ and the Chief Court of Oudh¹¹ hold, on the other hand, that the remedies are concurrent and that the purchaser has an additional remedy by suit.

A purchaser at a court sale of the interest of an undivided member of a joint Hindu family acquires only a right to sue for partition and for delivery of what may be allotted as the share of such undivided member. He cannot apply under Order 21 Rule 95.¹²

3. "By a purchaser." — The word 'purchaser' includes both a decree-holder purchaser and a stranger purchaser.¹ See also Note 2

- (1930) A I R 1930 Cal 586 (587) : 128 Ind Cas 244, *Jadav Chandra v. Akrur Chandra*
 (1900) 27 Cal 34 (37) : 4 Cal W N 417, *Madhusudan Das v. Gobinda Prida Chowdhurani*.
 (1934) A I R 1934 Cal 541 (542) : 150 Ind Cas 313, *Indra Dhusan v. Ram Kissen Bindhani*.
 4. (1927) A I R 1927 Nag 294 (295) : 103 Ind Cas 335, *Balaji Kashinath v. Anandrao*.
 5. (1925) A I R 1925 Sind 171 (173) : 78 Ind Cas 930 : 18 Sind L R 34, *Pirmal v. Sanghar*.
 6. (1907) 29 All 463 (466) : 4 All L Jour 434 : 1907 All W N 181, *Sheo Narain v. Nur Muhammad*.
 (1900) 1 Ind Cas 416 (424) : 31 All 82 (F B), *Mt. Bhagwati v. Banwari Lal*.
 (1928) A I R 1928 All 368 (370) : 60 All 670 : 115 Ind Cas 869, *Mohsin Raza Khan v. Haider Bakht*.
 7. (1893) 22 Bom 939 (944), *Shwajiram Sahebram v. Waman Narayan Joshi*.
 (1924) A I R 1924 Bom 527 (528) : 86 Ind Cas 503, *Lakshman Sadashiv v. Govind Ganesh*.
 (1930) A I R 1930 Bom 375 (377) : 125 Ind Cas 703 : 54 Bom 479, *Hiralal Mohanlal v. Ramchandra Kundanmal*.
 8. (1919) A I R 1919 Pat 297 (304) : 52 Ind Cas 711, *Sridhar Sardar v. Jageshwar Singh Maha Patra*.
 (1918) A I R 1918 Pat 546 (546, 547) : 47 Ind Cas 844, *Jagesur Singh v. Sridhar Sardar*.
 (1930) A I R 1930 Pat 308 (310) : 9 Pat 332 : 125 Ind Cas 516, *Jadab Chandra v. Rameshwar Marwari*.
 9. (1918) A I R 1918 Lah 204 (207, 210) : 1918 Pun Re No. 8 : 44 Ind Cas 169, *Chotha Ram v. Mt. Karmon Bai*.
 10. (1930) A I R 1930 Rang 61 (63) : 8 Rang 162 : 126 Ind Cas 209, *J. A. Martin v. S. M. Hashim*.
 (1930) A I R 1930 Rang 281 (282) : 127 Ind Cas 476, *Ma Hla May v. Nyanglebun Urban Co-operative Bank Ltd.*
 11. (1928) A I R 1928 Oudh 199 (203) : 3 Luck 182 : 110 Ind Cas 83 (F B), *Gaya Baksh Singh v. Rajendra Bahadur*.

Note 3

- 1 (1935) A I R 1935 Mad 803 (807) : 53 Mad 803 : 150 Ind Cas 279 (F B), *Abdul Aziz v. Chokkan Chettiar*.

above. A transferee from an auction-purchaser is competent to apply under Order 21 Rules 95 and 96 of the Civil Procedure Code and his application also would be governed by this Article.²

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4. Starting point. — Time, under this Article, runs from the date when the sale becomes absolute. In *Chandra Mani v. Anarjan Bibi*,¹ their Lordships of the Privy Council observed that in construing the words "when the sale becomes absolute" in Article 180, regard must be had not only to the provisions of Order 21 Rule 92 sub-rule 1, but also to the other material Sections and Orders of the Code including those which relate to appeals from orders made under Order 21 Rule 92 sub-rule 1, and that consequently, where there has been an appeal from an order of the Judge disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Article 180 until the disposal of the appeal, even though the Court of first instance may have confirmed the sale, as it was bound to do, when it decided to disallow the application.

There is no provision of law for excluding in favour of the auction-purchaser the period of the pendency of a suit filed by the judgment-debtor to set aside the sale.³

5. Extension and exclusion of time. — Neither Section 5 nor Section 14 of the Limitation Act applies to an application governed by this Article.¹ Section 15 also does not apply as that Section refers to a suit or an application for execution, and an application for

2 (1918) A I R 1918 All 405 (405) : 40 All 216 · 42 Ind Cas 936, *Budhu Mistr v Bhagirath Kuar*.

Note 4

1 (1934) A I R 1934 P C 134 (136) 61 Ind App 248 61 Cal 945 150 Ind Cas 11 (P C) (Reversing the decision in A I R 1932 Cal 75)

[See (1930) A I R 1930 Cal 86 (89) 56 Cal 608 120 Ind Cas 107, *Neckbar v. Prakash Nag* (This case must be deemed to be overruled by A I R 1934 P C 134)]

[See also (1935) A I R 1935 Cal 333 (335) 62 Cal 66 158 Ind Cas 191, *Jateendra Chandra v. Rebateo Mohan Das* (When, by reason of a competent Court, there is a cancellation of the cause of action for delivery, operating to suspend the rights of the auction purchaser, he is entitled, on the removal of such cancellation by a Court of appeal, to await a fresh cause of action, which arises by reason thereof)]

(1933) A I R 1933 Cal 311 (311) 147 Ind Cas 981, *Chhogan Lal v. Behari Lal*.

(1927) A I R 1927 Mad 391 (393) 99 Ind Cas 632, *Thayyammuthu v. Odayappan*.

(1920) A I R 1920 Mad 1 (7) 43 Mad 185 54 Ind Cas 66 (F B), *Muthu Korak Chetty v. Mahamad Madar Ammal*

(1914) A I R 1914 Cal 593 (593) 22 Ind Cas 497, *Janak Prosad v. Net Ram* (Appeal against confirmation—Compromise—Installation payment agreed to—Default clause—Limitation counts from date of default and not from date of first confirmation of sale)]

2. (1926) A I R 1926 Mad 857 (859) 96 Ind Cas 657, *Sornam Pillai v. Tiru-tazhiperumal Pillai*

Note 5

1. (1932) A I R 1932 Cal 75 (76) : 134 Ind Cas 1188, *Sm Anarjan Bibi v. Chandramani Shaha*.

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delivery of possession by an auction-purchaser, although it may be treated as an application in an execution proceeding, cannot be treated as an application for execution.²

6. Second application. — An order for delivery of possession is not a decree for possession and therefore cannot be kept alive by periodical applications.¹ Where an application for delivery of possession filed in time is dismissed or struck off or closed for statistical purposes, it will be deemed to be pending and a subsequent application for delivery, though made beyond three years after the confirmation of the sale, will be considered as a reminder to the Court to continue the pending application.² Where on an application for delivery an order for delivery is passed, but the property is not delivered owing to no fault of the applicant, but to the obstruction of the judgment-debtor and the petition is therefore dismissed, the dismissal must be considered to be one for statistical purposes only.³ But, where the delivery is not made owing to the laches of the applicant himself, and the petition is dismissed, the dismissal cannot be considered to be one for statistical purposes and the subsequent application for delivery can only be considered as a fresh application.⁴ Where the order on an application filed in time is not on merits and does not amount to refusal of the relief claimed and does not therefore compel the applicant to appeal, a subsequent application within a year of the first has been held to be in continuation of the first and hence in time.⁵

2. (1935) A I R 1935 Cal 333 (334) : 62 Cal 66 : 158 Ind Cas 191, *Jateendra Chandra v. Babatee Mohan Das*.

(1919) A I R 1919 Mad 1001 (1002) : 43 Ind Cas 155, *Subbayya v. Venkata-ramayya*. (32 Mad 186 and A I R 1917 Mad 979, Followed.)

Note 6

Sundara Rao v.
) Mad 1001, Fol-

ania Chelliar v.

Angappa Asari

(1933) A I R 1933 Mad 745 (748) : 145 Ind Cas 397, *Appaioo Nainar v. Lakshmana Reddi*. (Closed.)

3. (1933) A I R 1933 Mad 745 (748) : 145 Ind Cas 397, *Appaioo Nainar v. Lakshmana Reddi*. (See Per Oldfield J.'s opinion in A I R 1919 Mad 1001.)

(1919) A I R 1919 Mad 1001 (1003) : 43 Ind Cas 155, *Subbayya v. Venkata-ramayya*. (See Per Oldfield J.)

v. Padi-

v. Padi-

5. (1935) A I R 1935 Mad 807 (809) : 53 Mad 897 : 159 Ind Cas 279 (F B), *Abdul Aziz v. Chokkan Chelliar*

[See also (1919) A I R 1919 Pat 425 (430) : 49 Ind Cas 150 (F B), *Raghunandan v. not the decree holder of possession and reason of obstruction, is entitled to make a fresh writ of possession within the period of limitation allowed for such application without applying under Order 21 Rule 97.]*

181.* Applications for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908.	Three years.	When the right to apply accrues.	Article 181
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Synopsis

1. Legislative changes.
2. Scope.
3. "Or by section 48 of the Code of Civil Procedure, 1908."
4. Application for final decree in mortgage suits under Order 34 Rules 3 and 5, Civil Procedure Code.
5. Application for final decree in redemption suits—Order 34 Rule 8, Civil Procedure Code.
6. Application for personal decree—Order 34 Rule 6, Civil Procedure Code.
7. Application for restitution—Section 144, Civil Procedure Code.
8. Application for execution.
9. Application to set aside sale.
10. Applications under Section 47, Civil Procedure Code.
11. Application for refund of purchase money—Order 21 Rule 93, Civil Procedure Code.
12. Application by auction-purchaser for possession—Order 21 Rule 95, Civil Procedure Code.
13. Application to bring on record legal representatives.
14. Application to rescind leave to sue.
15. Miscellaneous applications under the Civil Procedure Code.
16. Application for final decree in partition and partnership suits.
17. Application for ascertainment of mesne profits.
18. Certification of payment by decree-holder under Order 21 Rule 2, Civil Procedure Code.
19. Application to amend decree.

* Act of 1877

178—Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, section 230.	Three years.	When the right to apply accrues.
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Acts of 1871 and 1859

No corresponding provision.

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20. Application to add parties.
21. Application for sale certificate.
22. Applications under other Acts.
23. Applications under the Code of Criminal Procedure.
24. Enlargement of time.

Other Topics

- Applicability of this Article—Test ... See Note 2, Pts. 5, 6
 Applicability of Article to applications under O. 21 R. 100, C. P. C. ... See Note 10
 Application in pending suit—Article not applicable ... See Note 16, Pt. 1
 Application to do act of purely ministerial character—Article does not apply ... See Note 2, Pts. 4, 4a; Note 21
 Application under Original Side Rules of High Court—Article not applicable ... See Note 2, F-N (2), (3)
 Applications under Provincial Insolvency Act: See Note 2 F-N (3), Note 22, Pt. 1
 Article applies only to applications under C. P. C. ... See Note 2, Pt. 3

1. **Legislative changes.** — There was no provision in the Limitation Acts of 1859 and 1871 corresponding to this Article. Applications which would now fall under this Article were not then subject to any rule of limitation. See also the undermentioned cases.¹

In the Act of 1877, Article 178 corresponding to this Article was introduced for the first time.

2. **Scope.** — The language of the Article makes it clear that it is restricted to *applications*,¹ and only to such applications as are *not provided for* elsewhere in the First Schedule of this Act or by Section 48 of the Code of Civil Procedure.

An examination of the Articles of the First Schedule relating to applications shows that in every one of those cases, the application is made under the Code of Civil Procedure. It has been held that a residuary Article like the present one must be construed *ejusdem generis* with the other Articles dealing with applications.² It would follow that this Article also applies only to applications which are

Article 181 — Note 1

1. (1874) 22 Suth W R 211 (211), *Muthoora Pershad Singh v. Mohunt Shumboo Geer*.
- (1879) 4 Cal L R 577 (579, 580), *Allaj Hossein v. Mushur Hossein*.

Note 2

1. (1883) 5 All 297 (298) : 1883 All W N 41, *Musaaffir Husain v. Ali Husain*.
 (It does not apply to suits.)
 (1906) 33 Cal 891 (883, 886) : 4 Cal L Jour 162, *Dhajahari Saha v. Behary Lal*.
2. (1888) 10 All 350 (353) : 1888 All W N 92 : 19 Ind Jur 36, *Queen-Empress v. Ajudha Singh*.
 (1890) 7 Bom 213 (214), *Dai Manekbai v. Manekji Karasji*.
 (1923) A I R 1923 Bom 268 (269) : 77 Ind Cas 497, *Thana Zalalji v. Dhana Jachrji*.
 (1891) 6 Cal 707 (708) : 8 Cal L R 52 : 5 Ind Jour 474, *In the matter of the Petition of Ishan Chunder Roy*.

made under the Code of Civil Procedure.³ It is not, however, every application under the Code that would be necessarily governed by this Article. Where it is the duty of the Court to do a particular thing *suo motu* independently of any application that may be made, or where the thing to be done is purely of a ministerial character, an application though made is not governed by this Article.⁴ Thus, a Court is bound, whether an application is or is not made, to pass a decree in accordance with the judgment or to dispose of a pending suit. No application need be made asking the Court to do its duty. If such an application is made, it would be considered to be merely

- (1919) A I R 1919 Cal 345 (346) . 46 Cal 249 . 51 Ind Cas 941, *Lakshmi Dassi v. Durgendra Nath* (Application under R. 27, Ch. 38 of the Original Side Rules, Calcutta High Court, is not governed by Art 181.)
- (1894) 17 Mad 379 (381), *Gnanamuthu Upadesi v. Vana Kosi Pillai Nadan*.
- (1927) A I R 1927 Nag 262 (263) . 102 Ind Cas 543, *Balaaji v. Gopal Mali*
- (1894) 16 All 23 (25) 1893 All W N 199, *Ranbir Singh v. Drigpal*.
See also Note 31 to Preamble.
3. (1933) A I R 1933 P C 63 (64) . 60 Ind App 13 142 Ind Cas 7 54 All 1067 (P C), *Hansraj Gupta v. Dehra Dun Mussorie Electric Tramway Co., Ltd*
- (1920) A I R 1920 Mad 974 (974) 60 Ind Cas 123, *Duraiyya Solagan v. Venkatarama Naicker* (Application under Sec. 36, Provincial Insolvency Act of 1907)
- (1908) 32 Bom 1 (5) 9 Bom L R 508, *Wadia Gandhi & Co. v. Purshottam*. (Under R 859 of Bombay High Court Rules)
- (1921) A I R 1921 Cal 67 (70) 48 Cal 817 . 66 Ind Cas 209, *Narendra Lal Khan v. Tarubala Dassi* (Under R 69, Ch. 33 of the Original Side Rules of the Calcutta High Court)
- (1901) 1901 All W N 46 (47), *Brijmohan Singh v. Kishan Mohan Singh*. (Under R 8 D of the Allahabad High Court dated 18th January 1899)
- (1883) 7 Bom 546 (551), *Collector of Broach v. Desai Raghunath*. (Proceedings under Bhagdari Act, Bombay Act 5 of 1862)
- (1907) 34 Cal 672 (675) 6 Cal L Jour 119 11 Cal W N 674, *Rahamat Karim v. Abdul Karim*
[See also (1895) 18 All 12 (15) 1895 All W N 136, *Connell v. Himalaya Bank Ltd* (Application to proceed under S 214 of Act 6 of 1882)]
- (1895) 20 Bom 543 (546), *Queen-Empress v. Nageshappa Pasi*]
4. (1916) A I R 1916 Cal 231 (232) 29 Ind Cas 211, *Beni Singh v. Barhamdeo Singh*.
- (1936) A I R 1936 P C 204 (206) 59 Mad 910 163 Ind Cas 4 : 63 Ind App 304 (P C), *Venkata Jagannath Rao v. Venkata Kumara Mahipati Surya Rao* (The law does not prescribe any special period for an application for an order of confirmation of court-sale)
- (1906) 30 Bom 415 (420) 8 Bom L R 218, *Balaaji v. Kushaba*
- (1881) 6 Cal 60 (63) 6 Cal L R 345, *Govind Chunder Goswami v. Rungunmomy* (Application to transfer a case from one Board to another, to transfer a case to the bottom of the Board, change of attorneys and so forth—Acts of ministerial character)
- (1881) 4 Mad 172 (173), *Kylasa Goundan v. Ramasamy Ayyan*
- (1882) 6 Bom 586 (587) 7 Ind Jur 35, *Vithal Janardhan v. Vithojirav Pullajirav* (Acts of ministerial character)
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made
- (1887) 9 All 364 (365) 1887 All W N 79, *Darbo v. Kesho Rai*
- (1923) A I R 1923 Bom 268 (269) 77 Ind Cas 497, *Thana Zalalji v. Dhana Jauharji*.

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drawing the attention of the Court to do what it is bound to do, and would not be governed by this Article.^{4a}

The *test* therefore to see whether this Article applies to a particular application is :

Firstly, whether the application is made under the Civil Procedure Code, that is, *authorized by the provisions of the Civil Procedure Code*,⁵ and *secondly*, whether the Court is not bound to exercise its powers and do the particular thing, unless moved by an application.⁶

Column 3 of the Article providing that time runs from the date when the right to apply accrues is only the expression of the broad common law principle that for the purpose of any particular application, time is to run from the moment at which the applicant first had the right to make it.⁷

3. "Or by section 48 of the Code of Civil Procedure, 1908."—The words "*or by section 48 of the Code of Civil Procedure, 1908*" occur not only in this Article but also in Article 182, *infra*, the first column of which runs as follows :—

"For the execution of a decree or order of any Civil Court not provided for by article 183 or by section 48 of the Code of Civil Procedure, 1908."

Taken literally, Article 182 could not apply to any application for the execution of a decree except a decree for injunction, inasmuch as *every decree except a decree for injunction is provided for by Section 48 of the Code of Civil Procedure*. It has, therefore, been held by the High Court of Madras that the words must be read with Section 3 of the Act, that the periods of limitation set out in the different Articles are only to be taken in reference to the *question of dismissal* and that this Article should consequently be read as follows :—

"Application for which no period of limitation for the purpose of dismissal is provided elsewhere in this schedule or by section 48, Civil Procedure Code."¹

4a (1883) 7 Bom 316 (322) . 7 Ind Jur 609, *Ishwardas Jagjeeandas v. Dombai*, (Application to pass judgment in terms of an award)

(1916) A I R 1916 Cal 231 (232) : 28 Ind Cas 211, *Bens Singh v. Darhamdeo Singh*.

(1914) A I R 1914 Cal 29 (32) : 20 Ind Cas 910, *Darhamdat Mussir v. Krishna Sahay*. (Under S 159, Ben. Ten. Act, to have rent assessed)

5. (1920) A I R 1920 Lah 51 (53) : 1 Lah 187 : 55 Ind Cas 620, *Hindustan Bank, Ltd. v. Mehraj Din*. (Art. 181, Limitation Act, refers to all applications for the making of which the Civil Procedure Code gives authority)

6. (1882) 4 Mad 172 (173), *Kylasa Goundan v. Ramasamy Ayyan*.

7. (1933) A I R 1933 Cal 251 (253) : 60 Cal 19 : 143 Ind Cas 679, *Pradyumna-kumar Malik v. Gopendra Mallik*.

(1928) A I R 1928 Cal 646 (649) : 56 Cal 61 : 117 Ind Cas 543 (S D), *Ilari Mohan v. Parameswar Sahu*.

Note 3

1. (1930) A I R 1930 Mad 995 (998) : 54 Mad 806 : 128 Ind Cas 713, *Deivanthamani Annamalai, Dentar v. Raju Pillai*.

4. Applications for final decree in mortgage suits under Order 34 Rules 3 and 5, Civil Procedure Code. — Before the passing of the Code of Civil Procedure, 1908, it was held in one class of cases¹ that an application for an order absolute for sale under Sections 87 and 89 of the Transfer of Property Act (4 of 1882) was one for an order for sale and would, therefore, be governed by Article 179 of the Act of 1877 (corresponding to the present Art. 182). In another class of cases,² the view was held that Article 179 of the Act of 1877 would not apply as there was no decree capable of execution and that consequently Article 178 (now Article 181) would apply. A third view expressed was that even Article 178 would not apply inasmuch as an application for an order absolute was not one "under the Code of Civil Procedure."³

Note 4

1. (1914) A I R 1914 P C 66 (67) : 36 All 350 : 23 Ind Cas 649 (P C), *Chandri Abdul Majid v. Jawahir Lal*.
 (1914) A I R 1914 P C 65 (66) : 36 All 284 : 41 Ind App 104 : 23 Ind Cas 644 (P C), *Batuk Nath v. Mt. Munni Devi*.
 (1898) 20 All 302 (304) : 1898 All W N 40, *Chunni Lal v. Harnam Das*.
 (1898) 20 All 357 (358) : 1898 All W N 71, *Parmeshri Lal v. Mohan Lal*.
 (1907) 29 All 279 (281) : 1907 All W N 45 : 4 All L Jour 145, *Sri Ram v. Het Ram*.
 (1899) 23 Bom 644 (653) : 1 Bom L R 136, *Bhagwan v. Ganu*.
 (1916) A I R 1916 Mad 288 (290) : 89 Mad 541 : 29 Ind Cas 237, *Mahammad Husam v. Abdul Kareem*.
 (1900) 25 Mad 244 (288) : 12 Mad L Jour 279 (F B), *Maliharjanudu Sella v. Lingamurthi Pantulu* (Per Bhashyam Ayyangar, J.).
 (1920) A I R 1920 Mad 286 (288) : 56 Ind Cas 563, *Ganapathia Pillai v. Gopala Iyer*. (Period of limitation obtaining under the old Act is not taken away by the passing of the new Civil Procedure Code.)
 (1921) A I R 1921 Mad 126 (128, 131) : 61 Ind Cas 979, *Visuanatha Sastry v. Sitalakshmi Ammal* (Do).
 (1917) A I R 1917 Mad 315 (316) : 32 Ind Cas 39, *Balaji Rao v. Harivrama Chetty* (Do).
 (1919) A I R 1919 Mad 969 (970) : 48 Ind Cas 782, *Ramaswami Reddy v. Sakkappa Reddy* (Do).
 (1893-1900) 1893-1900 Low Bur Rul 588 (590), *Ayalaano Padayachi v. R M A. R. Mutu Curpen Chetty*.
 [See also (1911) 9 Ind Cas 337 (338) : 14 Oudh Cas 10, *Jageshar Singh v. Bhagwan Bakhsh Singh*].
2. (1902) 21 All 542 (546) : 1902 All W N 160, *Ali Ahmad v. Nazran Bibi*.
 (1905) 27 All 625 (628) : 2 All L Jour 371 : 1905 All W N 136, *Baldeo Prasad v. Ibn Haidar*.
 (1904) 1 All L Jour 15 (17), *Udit Narain v. Jagannath*.
 (1903) 26 Mad 780 (792) : 13 Mad L Jour 412, *Rungiah Goundan & Co v. Nanjappa Row*.
 (1908) 31 Mad 68 (69) : 3 Mad L Tim 254 : 17 Mad L Jour 596, *Ramayyan v. Kadir Bacha Sahib*.
 [See also (1914) A I R 1914 Mad 15 (16) : 22 Ind Cas 40, *Ramanna v. Narayanaswami*].
3. (1895) 22 Cal 924 (927), *Teluck Singh v. Parsoteen Pershad*.
 (1894) 16 All 23 (25) : 1893 All W N 198, *Randir Singh v. Drigpal*.
 (1903) 16 C P L R 114 (116), *Jaka Patel v. Mt Jamna*.
 (1892) 5 C P L R 61 (62), *Tallappa Wani v. Dattu Kotual*.
 (1910) 6 Ind Cas 587 (539) : 37 Cal 796, *Madhubmoni Das v. Pamela Lambert*.
 (1903) 5 Bom L R 540 (541), *Ganu v. Narayan Vishal*.
 (1910) 8 Ind Cas 986 (987) (Low Bur), *Ahmed Ali v. Maung Ton*.

With a view to put an end to this conflict of decisions, it has now been provided that the application which follows a preliminary decree for sale or foreclosure is not for an order for sale, but for a *decree* for sale and the relevant provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code, so that it is no longer possible to contend that such an application is not one under that Code.⁴ An application under Order 34 Rules 3 and 5, *Civil Procedure Code*, is an application in the suit itself and not one for execution.⁵ Under those Rules the plaintiff *has to make an application* for a final decree.⁶ Therefore, an application for a final decree in a suit for sale or foreclosure is governed by this Article.⁷ Even where the mortgage suit is on the Original Side of a Chartered High Court, the application would be governed by this Article and not by Article 183 *infra*.⁸ The reason is that the application is not one to *enforce* a preliminary decree within the meaning of Article 183 *infra*. This Article will also apply to an application in respect of a compromise decree, where such decree contemplates the passing of a final decree.⁹

D (1917) A I R 1917 Cal 175 (175) : 37 Ind Cas 802, *Sashi Dhukin v. Pratur Chandra*. (Consent decree for foreclosure)

Time for an application for a final decree under Order 34 Rules 3 and 5, Civil Procedure Code, starts from "when the right to apply accrues," that is to say, from the day fixed in the preliminary decree for payment of the mortgage money.¹⁰ When time has once begun to run, it cannot be suspended by any proceedings in any Court, such as a suit in which the title of the mortgagor to the mortgaged property is in question,¹¹ or on account of the pendency of proceedings to set aside the preliminary decree passed *ex parte*,¹² unless an injunction or an order of stay is obtained from the proper Court.^{12a} As to enlargement of time under the relevant Sections, see Note 24 *infra*. Where a preliminary decree has been amended on account of some error in respect of the amount declared to be due, the date of such amendment cannot furnish a fresh starting point for an application

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- (1923) A I R 1923 All 29 (29) 70 Ind Cas 840, *Baledeo Das v. Pitambar*,
 (1917) A I R 1917 All 119 (119) : 39 All 532 : 40 Ind Cas 424, *Ramji Lal v. Karan Singh*.
 (1914) A I R 1914 Bom 263 (263) : 38 Bom 32 21 Ind Cas 318, *Datto Atmaram v. Shankar Dattatraya*.
- 10 (1923) A I R 1923 All 22 (22) 69 Ind Cas 199, *Ramachandrar v. Jaimal*.
 (1922) A I R 1922 Mad 65 (66) 69 Ind Cas 366, *Mummad Venkataiah v. Venkata Subbiah*.
 (1918) A I R 1918 All 235 (236) : 43 Ind Cas 518 : 40 All 235, *Ahmed Khan v. Mt. Gaura*.
 (1919) A I R 1919 Pat 131 (131) : 50 Ind Cas 514 : 4 Pat L Jour 523, *Ras Behari Singh v. Juman Lal*.
 (1923) A I R 1923 Sind 14 (15) 73 Ind Cas 311 : 17 Sind L R 255, *Sakerchand Narsidas v. Yacoob*. (An application put in as one for execution cannot be treated as one for final decree)
 (1938) A I R 1938 Oudh 112 (118) 173 Ind Cas 956, *Ram Dutta v. Mahpal Singh* (Preliminary decree on basis of compromise—Amount payable in instalments—On default of any one instalment, whole unpaid amount becoming payable and decree holder entitled to obtain final decree—Decree holder held entitled to apply for final decree on any default and not necessarily on the first default)
 (1914) A I R 1914 Bom 263 (263) 21 Ind Cas 318 (319) : 38 Bom 32, *Datto Atmaram v. Shankar Dattatraya*. (Instalment decree)
 (1913) 18 Ind Cas 731 (732) : 35 All 178, *Badri Narayan v. Kunji Behari Lal*. (Do.)
 (1918) A I R 1918 Bom 217 (219) 42 Bom 309 : 46 Ind Cas 107, *Narasing Rao v. Bandu Krishna* (Decree before 1909—Article 181 applied and right to apply accrued only on the coming into force of the new Civil Procedure Code)
 (1923) A I R 1923 All 29 (30) 70 Ind Cas 840, *Baledeo Das v. Pitambar*. (Even where there is a condition in the decree that until one judgment-debtor's share is found insufficient, no steps are to be taken against the other, right to apply for final decree accrues at the same time)
 (1926) A I R 1926 Oudh 12 (12) 91 Ind Cas 617, *Rudra Pratab Singh v. Suraj Kuer*.
11. (1925) A I R 1925 Mad 331 (333) : 85 Ind Cas 272, *Ammathaya Ammal v. Sivarama Pillai*.
 12. (1936) 1936 Mad W N 146 (146), *Thangal Rowther v. Naina Muhammad Rowther*.
 (1925) A I R 1925 Cal 1030 (1031) : 87 Ind Cas 746, *Mahamed Kamel v. Ahmad Ali*.
- 12a (1925) A I R 1925 Mad 331 (333) 85 Ind Cas 272, *Ammathaya Ammal v. Sivarama Pillai*.

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Note 4

for final decree.¹³

Where there has been an appeal from a preliminary decree and the Appellate Court has not extended the time for payment, the period of three years for an application for a final decree runs from the date of the decree of the Appellate Court and not from the date fixed for payment in the preliminary decree, whether the decree of the lower Court has been varied or affirmed.¹⁴ The reason is stated

(See also (1921) A I R 1921 Cal 381 (382) : 62 Ind Cas 418, *Hemendra Mohan v. Dharamnath Chandra*. (After preliminary decree in favour of a third mortgagee, a second mortgagee obtained a

13. (1923) A I R 1923 All 22 (22) : 69 Ind Cas 199, *Ram Chandar v. Jai Mal*.
(1922) A I R 1922 Nag 217 (219) : 18 Nag L R 58 : 68 Ind Cas 919, *Nanhe-lal v. Gulshan Rai*.

Singh v. Kishan Jwan Lal.

- (1923) A I R 1923 Cal 859 (391) : 75 Ind Cas 2, *Uma Charan v. Nisaran Chandra*.
(1921) A I R 1921 Mad 414 (415) : 44 Mad 714 : 64 Ind Cas 470, *Venkayya v. Sathiraju*.
(1933) A I R 1933 Mad 442 (446) : 56 Mad 520 : 143 Ind Cas 412, *Jujisti Mahapatrao v. Magata Patro*. (Appeal formally brought before Court withdrawn and dismissed.)
(1930) A I R 1930 Mad 356 (360) : 123 Ind Cas 199, *Dakshinamoorthi Pathan v. Krishnasami Kadaratan*.
(1930) A I R 1930 Mad 853 (854) : 125 Ind Cas 95, *Venkatarama Reddi v. ...* question of law and second a decree on merits and time
269, *Nimmala Mahankali v.*

- (1919) A I R 1919 Mad 938 (939) : 48 Ind Cas 185, *Subbarayalu Nayudu v. Sundararaya Nayudu*.
(1934) A I R 1934 Mad 65 (69) : 147 Ind Cas 1179, *Ramaswami Iyer v. Palluri Pathar*. (Where however pending appeal a final decree is passed and the appeal is dismissed, the decree-holder has a right within 3 years of the appellate decree to have the final decree amended so as to bring it in conformity with the appellate decision.)
(1912) 16 Ind Cas 799 (800) (Mad), *Thathara Nannabha Chetty v. Kuppal Krishnammal* (Plaintiff is not however entitled to calculate time allowing for period of grace from date of appellate decree.)
(1924) A I R 1924 Bom 93 (99) : 47 Bom 956 : 76 Ind Cas 1023, *Dattatraya Yathal v. Wasudeo Anant*.
(1924) A I R 1924 Lah 542 (583) : 81 Ind Cas 619 : 5 Lah 257, *Fitzholmes v. Bank of Upper India Ltd*.
(1922) A I R 1922 Pat 205 (207) : 1 Pat 444 : 66 Ind Cas 790, *Jawad Hussain v. Gendun Singh*.

by Mr. Justice Banerji in *Gajadhar Singh v. Kishan Jiwan Lal*,¹⁵ as follows:

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Note 4

"It seems to me that this rule contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the cause."

But where the appeal is dismissed under Order 41 Rule 11, Civil Procedure Code,¹⁶ or for want of prosecution,¹⁷ time would start from the date fixed in the decree of the lower Court. Where a decree in a suit for sale is against separate sets of defendants for different amounts and one set of defendants appeals against the decree so far as the decree against them is concerned, the starting point for an application for final decree as against the non-appealing defendants is the date of the original decree and not that of the appellate decree.¹⁸

It has been already seen that an application for a final decree is an application in a *suit* and not one in execution. Therefore, where an application for final decree is properly disposed of or is dismissed for default or non-prosecution, a second application made out of time cannot be treated as a continuation of the former application and will be barred.¹⁹ But, where the application is adjourned at the request of the defendant or is not judicially disposed of, a second application would be deemed to be an application asking the Court

(1918) A I R 1918 Oudh 378 (378) 21 Oudh Cas 176 47 Ind Cas 206, *Lallu Ram v. Jot Singh*

(1920) A I R 1920 Nag 52 (53) 54 Ind Cas 823, *Nilkant v. Madho Rao*.

(1918) A I R 1918 All 76 (77) 40 All 203. 48 Ind Cas 870, *Nizamuddin Shah v. Bohra Bhim Sen*

[But see (1915) A I R 1915 All 836 (337) : 38 All 21 : 30 Ind Cas 494, *Madho Ram v. Nihal Singh*

(1917) A I R 1917 Oudh 91 (92) : 20 Oudh Cas 205 : 41 Ind Cas 658, *Jagdish Singh v. Ram Adhin Singh*.]

15. (1917) A I R 1917 All 163 (163) 42 Ind Cas 93 : 39 All 641 (S B).

16 (1924) A I R 1924 Bom 98 (99) 96 Ind Cas 1023 47 Bom 956, *Dattatraya Yethal v. Wasudeo Anant*.

17. (1933) A I R 1933 Mad 442 (446) . 56 Mad 520 : 143 Ind Cas 412, *Jujisti Mahapatrao v. Magata Patro*.

(1922) A I R 1922 Pat 201 (202) 66 Ind Cas 97 . 1 Pat 435, *Chhotey Narain Singh v. Kedar Nath Singh*

18. (1921) A I R 1921 All 56 (58) 43 All 320 : 60 Ind Cas 617, *Gayan Singh v. Ata Husain*

19. (1918) A I R 1918 All 285 (296) : 40 All 235 : 43 Ind Cas 518, *Ahmad Khan v. Gaura*.

(1923) A I R 1923 Bom 420 (421) : 73 Ind Cas 167, *Haryiwan Deoray v. Gayanan Kashinath*

(1922) A I R 1922 Mad 65 (66) : 69 Ind Cas 866, *Mummad Venkatesh v. Venkata Subbiah*

(1937) A I R 1937 Sind 273 (275, 276) 172 Ind Cas 520 31 Sind L R 160, *Premomal Daomal v. Khudabux*

(1924) A I R 1924 Mad 890 (891) 85 Ind Cas 808, *Athamsa Routhier v. Ganesan*.

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to continue the prior application.²⁰

5. Application for final decree in redemption suits — Order 34 Rule 8, Civil Procedure Code. — An application by a mortgagee for a final decree under Order 34 Rule 8, Civil Procedure Code, in a suit for redemption is governed by this Article.¹ Sub-rule 3 of Order 34 Rule 8, Civil Procedure Code, requires an application to be made by the mortgagee.

Before the amendment of Order 34 Rule 8, Civil Procedure Code, by Act 21 of 1929, there was a difference of opinion as to whether an application by a mortgagor under that Rule was governed by any period of limitation. It was held in the undermentioned cases² that as the Rule, as it then existed, did not require the mortgagor to make an application, it was the duty of the Court to pass a final decree when the amount due was paid into Court and that, therefore, this Article would not apply to such an application. It was, however, held in other cases³ that an application made under that Rule should be regarded as an application for extension of time for payment and

[See however (1936) A I R 1936 Pat 93 (94) : 159 Ind Cas 248 : 15 Pat 51, *Harial Kamti v. Jhari Singh*. (First application dismissed for non-payment of batta—Dismissal not proper—Even then if second application is out of time, Court has inherent power to restore original application.)]

20. (1933) A I R 1933 Cal 816 (817) : 147 Ind Cas 206, *Menaka Dala Dasi v. Hiralal Gobindlal*.

(1925) A I R 1925 Nag 291 (292) : 21 Nag L R 47 : 88 Ind Cas 901, *Chimnaji Raibhanji v. Sonaji*.

(1928) A I R 1928 Mad 971 (972) : 109 Ind Cas 875, *Mallikaraja Pudu v. ...*

(1922) A I R 1922 All 446 (447) : 68 Ind Cas 175, *Kallu Mai v. Kashi Nath*. (Application for final decree returned for want of correct statement of amount due and description of property—No time fixed for amendment—Re-presented after expiry of three years—Held to be in time)

[See also (1919) A I R 1919 Cal 1032 (1034). 45 Ind Cas 657, *Makunda Lal Kundu v. Priya Nath Motra*.]

Note 5

1. (1925) A I R 1925 Oudh 255 (256) : 29 Oudh Cas 46 : 80 Ind Cas 706, *Md Baqar Khan v. Jagat Narain Lal*.

(1927) A I R 1927 All 805 (805) : 100 Ind Cas 324, *Abdul Karim v. Durga Prasad*.

2. (1914) A I R 1914 Mad 992 (993) : 21 Ind Cas 233, *Doki Khodalo Patro v. Lingaraj Vidy Bhushano*.

(1925) A I R 1925 Oudh 649 (650) : 29 Oudh Cas 261 : 90 Ind Cas 418, *Bhawani Prasad v. Ram Rati Kunwar*.

(1925) A I R 1925 Oudh 255 (256) : 29 Oudh Cas 46 : 80 Ind Cas 706, *Md. Baqar Khan v. Jagat Narain Lal*.

(1922) A I R 1922 Oudh 33 (34) : 66 Ind Cas 944, *Banke Behari Lal v. Ghani Ahmad*.

(1923) A I R 1923 Oudh 156 (157) : 74 Ind Cas 162, *Ram Rup v. Ghani Ahmad*.

(1927) A I R 1927 Bom 32 (34) : 50 Bom 730 : 93 Ind Cas 913, *Moru Narayeshet v. Ganjaban*.

3. (1919) A I R 1919 Bom 53 (56) : 43 Bom 689 : 51 Ind Cas 924, *Vasudev Vishnu v. Gopal Parashram*.

would be governed by this Article. The amendment of Order 34 Rule 8, Civil Procedure Code, in 1929 by inserting the words "on application made by the plaintiff" in sub-rule 1 makes it clear that an application by a mortgagor would also now be governed by this Article.

6. Application for personal decree—Order 34 Rule 6, Civil Procedure Code. — Before the enactment of the Code of Civil Procedure, 1909, there was a difference of opinion as regards the applicability of Article 178 (corresponding to this Article) to an application under Section 90 of the Transfer of Property Act. It was held in some cases¹ that the application could not be considered to be one for the execution of a decree within the meaning of Article 179 (corresponding to the present Article 182) and that, therefore, Article 178 would apply. In some cases,² on the other hand, it was held that as the application was not one under the Code of Civil Procedure, Article 178 did not apply. This conflict of opinion has been removed by the transfer of the provision relating to personal decrees, to Order 34 Rule 6 of the Code of Civil Procedure which requires the Court to pass a decree for the balance due *on an application* made by the plaintiff. Such an application is one made in a suit for a fresh decree and is clearly one under the Code of Civil Procedure within the meaning of this Article.³ Even where the mortgage decree is passed by a Chartered High Court on its Original Side, an application for a personal decree is governed by this Article

(1929) A I R 1929 Rang 304 (305). 124 Ind Cas 260, *Maung Saw v Ma Shin*.

Note 6

- 1 (1899) 21 All 453 (454) 1899 All W N 106, *Ram Sarup v Ghaurani*.
(1903) 6 Oudh Cas 114 (118), *Ram Raghubir v Mt. Zahurun nissa*.
(1911) 10 Ind Cas 21 (22) (Oudh), *Amir Chand v Narsingh Narain*.
2. (1907) 34 Cal 672 (675) 11 Cal W N 674 6 Cal L Jour 119, *Sheik Rahama. Karim v Sheikh Abdul Karim*.
(1899) 11 C P L R 141 (143), *Nathuram v. Raja Seth Gokuldas*.
- 3 (1925) A I R 1925 Cal 834 (836, 838, 842) 52 Cal 828 89 Ind Cas 1 (F B), *Francis Higgins Pell v Mannic Gregory*. (Overruling 42 Cal 294 A I R 1915 Cal 725.)

(1933) A I R 1933 Cal 251 (252) 60 Cal 19 143 Ind Cas 679, *Pradyumna Kumar v Gopendra Mallick*.

(1928) A I R 1928 Bom 323 (325) 113 Ind Cas 515, *Hari Janardhan v. Krishnaji Balkrishna*.

(1916) A I R 1916 Nag 1 (3) 13 Nag L R 76 . 39 Ind Cas 854, *Chunni Lal v Trihamdas*

(1920) A I R 1920 Upp Bur 21 (23) 60 Ind Cas 23 3 Upp Bur Rule 261, *Yinke Supaya v. Maung Kin*

[But see (1915) A I R 1915 Cal 725 (726) 42 Cal 294 30 Ind Cas 719, *Bishwambhar Saha v. Ram Sundar Karbaria Das* (Overruled in A I R 1925 Cal 834 without adverting to this argument. The difficulty has been removed by the insertion of the words "on application by him" in O. 34 R 6 by Act 21 of 1929)]

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and not by Article 183, *infra*.⁴ The reason is that it is an application for a new decree in the suit and cannot be said to be one for enforcing a judgment or decree within the meaning of Article 183. This Article will also apply to an application under Order 34 Rule 8A, Civil Procedure Code, a provision newly introduced by Act 21 of 1929.

The starting point of time for an application for personal decree is the date of the confirmation of the sale held in execution of the mortgage decree.⁵ Where an appeal is preferred against an order confirming a sale after dismissing an application to set aside the sale and such appeal also is dismissed, the period of three years under this Article begins to run from the date when the sale was confirmed by the Appellate Court and not from the date of confirmation of the sale by the lower Court.⁶ As to when time starts where mortgaged property has been ordered by Court to be sold privately, see the undermentioned case.⁷ Where a decree by mistake included a non-hypothecated property and the decree-holder applied for sale of such property after the sale of the properties covered by the mortgage and thereupon the judgment-debtor applied for and succeeded in getting the decree amended, it was held that, for an application for a personal decree, time must be deemed, under the circumstances of the case, to run from the date of such amendment.⁸

Where an execution sale of the mortgaged property is held and the decree is thereby fully discharged, but thereafter, in a separate suit, it is held that the mortgagor had no title to the mortgaged property and, therefore, the sale is *void* and the mortgagee applies for a personal decree, when does time begin to run? The High Court of Madras has held that the right to a personal decree accrues on the date when the sale is declared to be void.⁹ But the High Court

4. (1935) A I R 1935 Rang 187 (188) : 13 Rang 305 : 156 Ind Cas 701, *Chokalingam Chettiar v. Maung Tun Yin*.

5. (1931) A I R 1931 Cal 166 (167) : 58 Cal 741 : 130 Ind Cas 815, *Krishna Bandhu Ghatak v. Panchlari Saha*. (Time runs not from the date of sale.)

(1933) A I R 1933 Cal 251 (252) : 60 Cal 19 : 143 Ind Cas 679, *Pradyumna-kumar v. Gopendra Mallik*. (Fact of decree-holder's costs not having been taxed will not delay starting point.)

(1913) 21 Ind Cas 530 (530) (Mad), *Rama Venkata Subba Iyer v. Shanmukham Pillai*.

(1906) 23 All 660 (664) : 3 All L Jour 445, *Gajadhar Lal v. Alliance Bank of Simla*.

[See also (1912) 14 Ind Cas 591 (592) (All) *Behary Lal v. Basheswar*

6. (1902) 1902 All W N 50 (51), *Fasal Hussain Khan v. Shohrat Singh*.

9. (1926) A I R 1926 Mad 941 (942) : 97 Ind Cas 502, *Siva Subramania Pillai v. Peraralingam Pillai*.

of Allahabad has taken the view that time runs from the date when the purchase-money is refunded.¹⁰

An application for a personal decree which has been dismissed, cannot furnish a starting point for a fresh application, since the application is not one for execution of a decree.¹¹

7. Application for restitution—Section 144, Civil Procedure Code.—There is a great divergence of judicial opinion as to whether this Article or Article 182 applies to an application for restitution. Under Section 583 of the Code of Civil Procedure, 1882, an application for restitution was regarded as being in execution of the appellate decree and was held governed by Article 179 (now Article 182) of the Act of 1877.¹ Applications for restitution, not falling within that Section, were not treated as execution applications but were held to be governed by Article 178.²

Under the Code of Civil Procedure of 1908, the High Courts of Madras, Bombay, Patna and Rangoon and the Chief Court of Oudh have held that an application for restitution is one in execution of a decree within the meaning of Article 182 *infra*.³ But the High

10. (1927) A I R 1927 All 395 (396) · 49 All 506 · 100 Ind Cas 775, *Dadal Singh v. Debi Saran*.

11. (1918) A I R 1918 All 105 (106) · 40 All 551 · 47 Ind Cas 562, *Mohammad Ilfat Hussain v. Allimunnissa*.

Note 7

1. (1897) 20 Mad 448 (449) : 8 Mad L Jour 79, *Venkayya v. Ragavacharlu*.
(1910) 7 Ind Cas 886 (889) (Cal), *Amulya Ratan v. Preo Nath Dutt*.
(1886) 8 All 545 (549) : 1886 All W N 178, *Nand Ram v. Sita Ram*.
[But see (1887) 10 Mad 66 (67), *Kurupam Zamindar v. Sadasiva*.
(Dissented from in 20 Mad 448.)]
2. (1912) 16 Ind Cas 238 (239) (Cal), *Massirunnissa Khatun v. Joy Chand Lal*.
(1900) 28 Cal 118 (115), *Harish Chandra Shaha v. Chandra Mohan Dass*.
[See also (1908) 30 All 476 (479) · 5 All L Jour 527 · 1908 All W N 206, *Bithaldas v. Jamna Prasad*.]
3. (1937) A I R 1937 Mad 150 (150) : 107 Ind Cas 258, *Kandaswami Mudali v. Annamalai Reddy*.
(1926) A I R 1926 Mad 813 (814) · 95 Ind Cas 587, *Panchapakesa Ayyar v. Natesa Pattar*.
(1917) A I R 1917 Mad 194 (195) : 42 Ind Cas 530, *Unnamalai Ammal v. Mathan*.
(1931) 1931 Mad W N 1006 (1007), *Muniah v. Gangamma*.
(1921) A I R 1921 Bom 67 (67) : 45 Bom 1137 · 62 Ind Cas 233, *Hamidalli Kadamalli v. Ahmadalli Mhibuballi*.
(1934) A I R 1934 Pat 246 (248, 251, 253) · 13 Pat 411 · 148 Ind Cas 1180 (F B), *Bhaunath Singh v. Kedar Nath Singh*. (Overruling A I R 1925 Pat 1.)
(1934) A I R 1934 Pat 646 (647) · 152 Ind Cas 944, *Lokenath Singh v. Mahabir Singh*.
(1923) A I R 1923 Pat 371 (374) · 72 Ind Cas 912 : 2 Pat 277, *Basanta Kumari Das v. Balmahund Marwari*.
(1933) A I R 1933 Rang 180 (183) : 11 Rang 275 · 143 Ind Cas 869, *Muthu-larappan Chettyar v. Annamalai Chettyar*.

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Courts of Calcutta, Allahabad and Lahore and the Judicial Commissioner's Court of Nagpur have held that such an application is not one in execution of a decree but is one governed by this Article.⁴ Even according to the latter view, however, where restitution is claimed on the reversal by the Privy Council, of a decree of a High Court, the application is one *to enforce* the decree of the Privy Council within the meaning of Article 183 *infra*, and is governed by that Article.⁵

- (1931) A I R 1931 Oudh 51 (52) : 130 Ind Cas 78 : 6 Luck 448, *Chandika Singh v. Bithal Das*.
[See also (1926) A I R 1926 Oudh 199 (199, 200) : 1 Luck 40 : 92 Ind Cas 23, *Santi Sahai v. Chhulan Kurmi*. (Benefit of S. 6 given.)]
(1917) A I R 1917 Bom 210 (211) : 41 Bom 625 : 41 Ind Cas 233, *Kurgodi Gauda v. Nangan Gauda*. (Do.)
(1919) A I R 1919 Bom 175 (176) : 43 Bom 235 : 48 Ind Cas 180, *Shivbat Babya Swami v. Yeshu Cheoo Nayakim*.]
[But see (1925) A I R 1925 Pat 1 (8, 14) : 78 Ind Cas 200 : 3 Pat 871 (F B), *Balmakunda Marwari v. Basanta Kumari Dass*.]
(1928) A I R 1928 Pat 598 (599) : 114 Ind Cas 476 : 7 Pat 794, *Rambu Jhawan Thakur v. Bankey Thakur*.
(1918) A I R 1918 Pat 52 (53) : 89 Ind Cas 653 : 2 Pat L Jour 206, *Jagdis Narain Singh v. F. H. Holloway*.
(1918) A I R 1918 Pat 396 (398) : 47 Ind Cas 47 : 3 Pat L Jour 367, *Krupansindhu Roy v. Balbhadra Das*.
(1915) A I R 1915 Low Bur 141 (142) : 8 Low Bur Rul 262 : 30 Ind Cas 680, *Asha Bibi v. Nuruddin*.]
4. (1932) A I R 1932 Cal 308 (310) : 59 Cal 337 : 137 Ind Cas 302, *Saraj Bhusan Ghosh v. Debendra Nath Ghosh*.
(1926) A I R 1926 Cal 931 (982) : 92 Ind Cas 960, *Fazalar Rahaman v. Abdul Samad*.
(1917) A I R 1917 Cal 188 (193) : 38 Ind Cas 17, *Asutosh Goswamy v. Upendra Prosad*.
(1938) A I R 1938 All 552 (554) : 177 Ind Cas 695, *Rama Kant v. Satya Narain*.
(1934) A I R 1934 All 626 (645) : 57 All 26 : 150 Ind Cas 1096 (F B), *Parmeshwar Singh v. Sitaladin Dube*.
(1922) A I R 1922 All 223 (225) : 44 All 407 : 66 Ind Cas 144, *Jiwa Ram v. Nand Ram*.
(1938) A I R 1938 Lah 456 (457) : 177 Ind Cas 430, *Telu v. Raja Ram*.
(1926) A I R 1926 Lah 685 (686) : 96 Ind Cas 804, *Gujar Mal v. Narain Singh*.
(1924) A I R 1924 Lah 166 (166) : 76 Ind Cas 501, *Chanda Singh v. Bishen Singh*.
(1918) A I R 1918 Lah 378 (379) : 1918 Pun Re No. 67 : 44 Ind Cas 301, *Ram Singh v. Sham Parshad*.
(1935) A I R 1935 Nag 76 (77), *Babu Lal Brahmam v. Mt. Govindbhai Mura*.
(1921) A I R 1921 Nag 112 (113) : 54 Ind Cas 664 : 17 Nag L R 62, *Mt. Radha v. Mt. Sakhu*.
[But see (1923) A I R 1923 Nag 101 (101) : 76 Ind Cas 255 : 18 Nag L R 200, *Sonba v. Parashram* (Art 182 applies.)]
(1923) A I R 1923 Nag 94 (94) : 71 Ind Cas 42, *Laxman v. Bishram*. (Governed by Art. 120).]
5. (1928) A I R 1928 All 293 (294, 297) : 50 All 767 : 112 Ind Cas 876, *Sohan Bibi v. Baijnath Das*.
(1922) A I R 1922 All 238 (239, 240) : 66 Ind Cas 545 : 44 All 555, *Brij Lal v. Damodar Das*.
(1923) 44 Mad L Jour 47 (48) (N I C) (Critical Note on 44 All 555 : A I R 1922 All 238, *Brij Lal v. Damodar Das*).
(1921) 61 Ind Cas 806 (807) (All), *Madhusudan Das v. Brij Lal*.

According to the Courts taking the second of the two views mentioned above, the right to apply for restitution accrues on the date when for the *first time* a decision is given entitling the party to apply for restitution⁶ Thus, where a decree reversing that of a trial Court is confirmed in second appeal, the period of limitation for an application for restitution begins to run from the date of the decree of the lower Appellate Court and not from the date of the decree in second appeal confirming the reversing decree.⁷ Similarly, where an *ex parte* decree is set aside after a sale in execution thereof and the suit is subsequently dismissed after trial, time for an application for restitution runs from the date of the order setting aside the *ex parte* decree and not from the date of the dismissal of the suit⁸ It has, however, been held in the undermentioned cases⁹

6. (1933) A I R 1933 Cal 422 (423) : 144 Ind Cas 150, *Ashutosh Choudhury v. Sm. Kumed Kamini Dass.*
- (1917) A I R 1917 Cal 169 (193) : 38 Ind Cas 17, *Ashutosh Goswamy v. Upendra Prosad.*
7. (1934) A I R 1934 All 626 (645) : 57 All 26 : 150 Ind Cas 1096 (F B), *Parmeshar Singh v. Sifta Din Dube*
- (1932) A I R 1932 All 609 (610) : 141 Ind Cas 121 : 54 All 770, *Mt. Dhapo v. Bahridi.*
- (1932) A I R 1932 Cal 308 (310) : 59 Cal 337, 137 Ind Cas 302, *Saraj Bhusan Ghosh v. Debendra Nath Ghosh.*
- (1926) A I R 1928 Cal 616 (651) : 56 Cal 61 : 117 Ind Cas 543 (S B), *Hars Mohan Dalal v. Parameshwar Sahu.*
- (1933) A I R 1933 Cal 422 (424) : 144 Ind Cas 150, *Ashutosh Choudhry v. Sm. Kumed Kamini Dass.* (Execution sale—Decree-holder withdrew amount due to him—Later on, sale set aside and decree holder refunded the money and auction-purchaser withdrew it—Decree-holder appealed and sale confirmed in appeal—A defendant preferred a second appeal therefrom which was dismissed—Time runs from date of first appellate order)
- (1924) A I R 1924 Lah 166 (167) : 76 Ind Cas 501, *Chanda Singh v. Bishen Singh*
[But see (1926) A I R 1926 Cal 981 (982) : 92 Ind Cas 960, *Fazlar Rahman v. Abdul Samad.*
- (1918) A I R 1918 Cal 457 (458) : 43 Ind Cas 775, *Atul Chandra Singh v. Kunja Behari Singha*
- (1935) A I R 1935 Cal 225 (227) : 62 Cal 298 : 155 Ind Cas 991, *Krishna Chandra v. Pabna Dhanabhandar Co., Ltd.*
- (1933) A I R 1933 Rang 180 (182) : 11 Rang 275 : 149 Ind Cas 699, *Muthukarappan Chettyar v. Annamalai Chettyar.* (Assuming Art 181 applies time starts from date of decree in second appeal)
- (1928) A I R 1928 Pat 593 (599) : 7 Pat 794 : 114 Ind Cas 476, *Rambujawan Thakur v. Bankey Thakur.* (Do.))
8. (1931) A I R 1931 Lah 504 (504) : 134 Ind Cas 206, *Gujar Mal v. Narain Singh* (No fresh accrual of right after dismissal of suit.)
- (1900) 28 Cal 113 (115), *Harish Chandra Shaha v. Chandra Mohan Dass.*
9. (1934) A I R 1934 All 626 (645) : 57 All 26 : 150 Ind Cas 1096 (F B), *Parmeshar Singh v. Siftadin Dube.*

[But see (1935) A I R 1935 Nag 76 (77), *Dabulal v. Mt. Gorindi Bai.*]

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that where the application for restitution is for *mesne* profits, time does not begin to run until possession of the property has been restored to the successful applicant.

In cases of applications for restitution governed by this Article, a second application made after the prescribed period cannot be treated as a continuation of, or kept alive by, the earlier application.¹⁰ Where a restitution application is stayed and consigned to the record room without final orders being passed on it, the application must be deemed to remain pending and after the order of stay is discharged, no question of any limitation under the Article can arise.¹¹

8. Application for execution.—See Notes to Article 182, *infra*.

9. Application to set aside sale.—See Notes 1, 2, 8 and 10 to Article 166, *ante*.

10. Applications under Section 47, Civil Procedure Code.—Where a decree-holder recovers in execution, money in excess of what is due to him or to his share or in excess of the decree as amended later on, an application by the judgment-debtor under Section 47, Civil Procedure Code, for the refund of such excess amount is governed by this Article.¹

As to the applicability of this Article to applications under Order 21 Rule 100, Civil Procedure Code, by judgment-debtors, see Note 3 to Article 165, *ante*.

11. Application for refund of purchase money — Order 21 Rule 93, Civil Procedure Code.—An application by an auction-purchaser in an execution sale for the refund of purchase money under Order 21 Rule 93, Civil Procedure Code, is governed by this

10. (1926) A I R 1926 Lah 685 (686) : 96 Ind Cas 804, *Gujar Mal v. Narain Singh*.

(1938) A I R 1938 Lah 456 (457) : 177 Ind Cas 430, *Telu v. Raja Ram*.

11. (1938) A I R 1938 All 552 (554) : 177 Ind Cas 695, *Rama Kant v. Satya Narain*.

Note 10

1. (1885) 7 All 371 (372) : 1885 All W N 61, *Mula Raj v. Debi Dihal*. (Right to apply accrues when the account was taken and stated on the application of the judgment-debtor)

(1908) 80 All 476 (479) : 1908 All W N 206 : 5 All L Jour 527, *Bithal Das v. Jamna Prasad*. (*Ex parte* decree set aside and a fresh decree for a smaller sum passed after trial)

(1905) 27 All 485 (487) : 2 All L Jour 169 : 1905 All W N 63, *Harnam Chandar v. Muhammad Yar Khan*. (Decree awarding larger sum than was due under judgment—Amount recovered—Subsequent amendment of decree and application for refund of excess—Time starts from date of amendment.)

decree)

[See also (1920) A I R 1920 Bom 208 (209) : 44 Bom 97 : 55 Ind Cas 967, *Ganpatrao Sultanrao v. Anandrao Jagdecras*.]

Article,¹ and time runs from the date of the order setting aside the sale.²

12. Application by auction-purchaser for possession — Order 21 Rule 95, Civil Procedure Code.—See Notes to Article 180, *ante*.

13. Application to bring on record legal representatives.—Applications to bring on record the legal representatives of a deceased party are governed by Articles 176 and 177, *ante*. But this Article will govern an application to bring on record the legal representatives of a deceased person who was not a defendant or respondent on the date of his death.¹

A decree of the Privy Council has full force and effect notwithstanding the death, before the date of judgment or hearing, of a respondent in the appeal before it and against whom a decree is passed. An application to bring on record his legal representatives in such a case falls within this Article.²

Where a plaintiff, who is suing in a representative capacity, dies, an application by a person who is one of those represented by the deceased is governed by this Article.³

See also the undermentioned cases.⁴

As regards the applicability of this Article to applications to bring on record the legal representatives of a deceased person in

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Note 11

- 1 (1918) A I R 1918 Mad 353 (355) 40 Mad 1009 : 45 Ind Cas 109, *Tirumalaisamy Naidu v Subramaniam Chettiar*
(1889) 11 All 372 (374) 1889 All W N 113, *Giridhari v Sital Prasad*.
(1923) A I R 1923 Cal 85 (88) 50 Cal 115 70 Ind Cas 606, *Mahar Ali v Sarfaddin*.
[See also (1910) 6 Ind Cas 804 (806) (Cal), *Gopal Saran Narain Singh v. Mahomed Sheshk Ashkam*]
2. (1889) 11 All 372 (374) 1889 All W N 113, *Giridhari v Sital Prasad*.
(1918) A I R 1918 Mad 353 (355) : 40 Mad 1009 45 Ind Cas 109, *Tirumalaisamy Naidu v. Subramaniam Chettiar*.

Note 13

1. (1924) A I R 1924 Lah 316 (318) 73 Ind Cas 337, *Wahid Bakhsh v. Lalita Pershad*
2. (1924) A I R 1924 Mad 695 (695) : 47 Mad 618 80 Ind Cas 85, *Kalyani Pillai v. Thiru Venkataswami Iyengar*.
3. (1931) A I R 1931 Mad 590 (591) 54 Mad 770 132 Ind Cas 239, *Mahomed Kanni Rowther v. Nana Mahomed Rowther*
(1919) A I R 1919 Mad 479 (480) 49 Ind Cas 263, *Krishnaswami Iyer v. Seethalakshmi Ammal*. (Reversioner)
- (1921) A I R 1921 Mad 124 (124) 62 Ind Cas 360, *Saminatha Pillai v. Rajagopala Mudaliar*. (Application by co-trustee after death of trustee)
4. (1882) 8 Cal 837 (347) 10 Cal L R 449 7 Ind Jur 26, *Benode Mohini Chowdhram v. Sharat Chunder Dey Chowdhury*
(1903) 30 Cal 609 (612) : 7 Cal W N 517 (F B), *Surendra Keshub Roy v. Khetter Krishto Mitter*.

Therefore, an application for a final decree in a suit for partition,² or in a suit for dissolution of partnership and accounts, is not governed by this Article.³

17. Application for ascertainment of mesne profits.—Under Section 244 of the Code of Civil Procedure, 1882, mesne profits were to be ascertained in execution. Nevertheless, the general trend of opinion was that proceedings for the ascertainment of mesne profits under Sections 211 and 212 of that Code were not proceedings in execution of a decree, but proceedings in continuation of a suit, and that, therefore, neither Article 178 nor Article 179 was applicable to such proceedings.¹ Order 20 Rule 12 of the Code of Civil Procedure, 1908, clearly provides that such proceedings are to be regarded as made in the suit itself and casts a duty upon the Court to pass a final decree after ascertaining the mesne profits. Therefore, an application for determination of mesne profits is not governed by

- (1892) 19 Cal 132 (138) (F B), *Puran Chand v. Roy Radha Kishen*. (A case of mesne profits)
2. (1895) 22 Cal 425 (434), *Duarka Nath Misser v. Barunda Nath Misser*.
(1905) 28 Mad 127 (129) 14 Mad L Jour 436, *Latchmana Chetty v. Ramanaathan Chetty*.
(1916) A I R 1916 Mad 609 (810) 30 Ind Cas 380, *Srinivasa Mudali v. Ramaswamy Mudali*.
(1918) A I R 1918 Mad 751 (755) 40 Ind Cas 820, *Sethurama Sahib v. Chotta Raja Sahib*.
(1938) A I R 1938 Oudh 229 (230) 177 Ind Cas 556, *Chintaman Tewari v. Bhagwathi Tewari*.
(1929) A I R 1929 Oudh 456 (457) 121 Ind Cas 287, 5 Luck 280, *Lalta Prasad v. Brahma Din*.
(1920) A I R 1920 Oudh 231 (232) 60 Ind Cas 433 23 Oudh Cas 281, *Tajammul Husain v. Bande Raza*.
(1933) A I R 1933 Pesh 101 (103) 146 Ind Cas 201, *Faqir Chand v. Mahomed Akbar Khan*.
(1930) A I R 1930 Nag 206 (207) 122 Ind Cas 411 26 Nag L R 166, *Mt. Lazimbi v. Tukaram*.
(1906) 1906 Pun Re No 47 1907 Pun L R No. 86 1906 Pun W R No. 94, *Durga Das v. Faqir Chand*.
[But see (1929) A I R 1929 Oudh 117 (120) 112 Ind Cas 205, *Bisheshwar Gir v. Satish Chandra*]
3. (1930) A I R 1930 Mad 528 (533) 53 Mad 378 181 Ind Cas 160, *Ramanathan Chetty v. Alagappa Chetty*.

Note 17

1. (1892) 19 Cal 132 (139) (F B), *Puran Chand v. Roy Radha Kishen*.
(1897) 25 Cal 203 (206), *Pryag Singh v. Raju Singh*.
(1904) 26 All 623 (625) 1904 All W N 146 1 All L Jour 344, *Walia Bibi v. Nazar Hasan*.
[See also (1879) 4 Cal 629 (633), *Dildar Hossein v. Mujeeddunnissa*.
(1874) 22 Suth W R 828 (329), *Bunsee Singh v. Mirza Nuzuf Ali Beg.*]
[See however (1881) 8 Cal 89 (91) 10 Cal L R 272, *Hem Chunder Chowdhry v. Brojo Soondury Debee* (Art 182 applies)]
(1887) 14 Cal 50 (54) 11 Ind Jur 143, *Anando Kishore Dass Bhalshahi v. Anando Kishore Bose*. (Art. 178 applies.)
(1900) 24 Bom 149 (155) 1 Bom L R 638, *Uttama Ram v. Kishordass*.

a certificate of certain payment into an application within the meaning of this Article.²

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19. Application to amend decree.—An application to amend a decree so as to bring it in conformity with the judgment, or on account of arithmetical or clerical errors, is not governed by this Article or by any other Article.¹ The reason is that this Act relates to the action of parties, but not to the action of the Court. And it is the duty of the Court to amend the decree whenever it becomes aware of its variance with the judgment or of the clerical or arithmetical errors in it. When the parties move the Court for such a purpose, they are only bringing the variance or error to the notice of the Court, so that there is no application properly so called.²

20. Application to add parties.—Rules of limitation do not preclude a Court from acting under Order 1 Rule 10,¹ or Order 41 Rule 20² of the Code of Civil Procedure in adding a person as a necessary party to a suit or to an appeal. It is a power which may be exercised by the Court *suo motu* so long as the Court is seised of

(1921) A I R 1921 Bom 411 (412) : 45 Bom 91 59 Ind Cas 399, *Pandurang Balkrishna v. Jagya Bhau*

(1929) A I R 1929 Cal 687 (689). 57 Cal 789 127 Ind Cas 258, *Hridaymohan Sanyal v. Khagendra Nath*.

[But see (1925) A I R 1925 Rang 26 (27) . 84 Ind Cas 369 . 2 Rang 393, *Maung Law San v. Maung Po Thein*.

(1922) A I R 1922 Cal 30 (31) : 68 Ind Cas 780, *Bah Mahammad Sahi v. Ajanmai*]

2 (1929) A I R 1929 P C 19 (23) 114 Ind Cas 581 56 Ind App 30 3 Luck 684 (P C), *Shri Prakash Singh v. Allahabad Bank, Ltd*

(1935) A I R 1935 Mad 922 (923) 159 Ind Cas 38, *Gangayya v. Seshagiri Rao*

Notes 19

1 (1884) 7 All 276 (280) 1885 All W N 13, *Raghunath Das v. Raj Kumar*.

(1886) 8 All 519 (534) . 1886 All W N 182, *Dhan Singh v. Basant Singh*.

(1887) 11 Bom 284 (285), *Shuappa v. Stepanch Lingapa*.

(1887) 9 All 364 (365) 1887 All W N 79, *Darbo v. Kesho Ras*.

(1888) 11 All 267 (291) 1889 All W N 55 13 Ind Jur 427 (F B), *Muham-*
med Ali v. Mulla (Per Mahmood J)

erial function)

ishid

(1897) 1897 Pun Re No 12, *Devi Das v. Gurdatta*.

(1911) 12 Ind Cas 151 (154) (Cal), *Langat Singh v. Janki Koor*

(1913) 21 Ind Cas 540 (541) 7 Sind L R 53, *Dikhomal Lalchand v. Rajah-*
mal Manomal.

[But see (1882) 4 All 23 (24) 1881 All W N 114, *Gaya Prasad v. Shikhar Prasad*.

(1886) 8 All 492 (495) 1886 All W N 156, *Tarsi Ram v. Man Singh*]

2 (1886) 11 Bom 284 (285), *Shuappa v. Shuapanch Lingapa*

Notes 20

1. (1892) 14 All 524 (528) . 1892 All W N 104, *Imamuiddin v. Luladhar*

(1886) 12 Cal 642 (652), *The Oriental Bank Corporation v. J. A. Charriol*

2 (1889) 18 All 78 (85) 1891 All W N 1, *Sohna v. Khalal Singh*

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the case and is empowered by that Code to so act. Therefore, even if an application is made for such a purpose by a party, it is not governed by this Article. But it does not mean that a suit cannot be dismissed under Section 22 *ante*, as against that party on the ground of limitation. The power of a Court to add a party and the duty of the Court to dismiss the suit as barred by limitation are two different questions.³

An application by a person to get himself added as a party to a suit under Order 22 Rule 10, Civil Procedure Code, is not also governed by this Article.⁴ The right of an assignee *pendente lite* to apply in a pending suit is a right which accrues from day to day.

21. Application for sale certificate.— This Article does not apply to an application for grant of a certificate of sale under Order 21 Rule 94, Civil Procedure Code.¹ The reason is that it is an application for the exercise of a function of a purely ministerial character.

22. Applications under other Acts.— As has been seen in Note 2 *ante*, this Article applies only to applications under the Code of Civil Procedure. Thus, it does not apply to applications under the Provincial Insolvency Act (5 of 1920), for which no period of limitation is prescribed,¹ or under the Indian Companies Act,² or to

3. (1892) 14 All 524 (528) : 1892 All W N 104, *Imamuddin v. Lalladhar*.

4. (1913) 20 Ind Cas 685 (687) (Cal), *Prasanna Kumar v. Asutosh Roy*.

Note 21

1. (1882) 4 Mad 172 (173), *Kylasa Goundan v. Ramasami Ayyan*.
- (1882) 6 Bom 586 (587), *Vithal Janardhan v. Vithojirav Putlajirav*.
- (1883) 1883 All W N 262 (262), *Petition of Kishen Singh*.
- (1884) 8 Bom 377 (380), *Devidas Jagjnan v. Pirjada Begam*.
- (1910) 5 Ind Cas 263 (264) (All), *Salig Ram v. Narain Das*.
- [But see (1880) 5 Bom 206 (207), *Tukaram v. Satraji Khanduji*.
- (1880) 5 Bom 202 (206), *In re Khaja Patthanji*.]

Note 22

1. (1924) A I R 1924 Mad 163 (167) : 47 Mad 120 : 75 Ind Cas 572, *Sivasubramania Pillai v. Theethiappa Pillai*. (Application to prove debt in insolvency.)
- (1920) A I R 1920 Mad 974 (974) : 60 Ind Cas 123, *Durasya Solagan v. Venkatarama Naicker*. (Application to avoid a transfer made by insolvent before insolvency.)
- (1924) A I R 1924 Lah 553 (554) . 75 Ind Cas 995, *Daryav Singh v. Kunj Lal*. (Do.)
- (1925) A I R 1925 Mad 172 (173) : 79 Ind Cas 443, *Ramaswamiah v. Subramania Ayyar*. (Do.)
- (1920) A I R 1920 Lah 470 (470) : 52 Ind Cas 188 : 1919 Pun Re No. 151, *Nikka Mdl v. Marwar Bank Ltd.* (Do.)
- (1924) A I R 1924 Lah 331 (333) . 69 Ind Cas 403, *Pirthi Nath v. Bakeshar Nath*. (Do.)
2. (1933) A I R 1933 All 789 (794) : 55 All 912 : 145 Ind Cas 893 (F B), *Shiam Lal v. Official Liquidators, U. P. Oil Mills Co., Ltd.* (Application by a liquidator under S. 235, Companies Act.)

applications for the grant or revocation of probate or letters of administration.^{2a} But where an application, though made under an Act other than the Code of Civil Procedure, is made to the Court asking it to exercise its jurisdiction by putting in motion the machinery of the Code of Civil Procedure, it will be an application falling within the scope of this Article.³

See also the undermentioned cases⁴ where this Article has been applied without adverting to the fact that the application is not one under the Code of Civil Procedure.

23. Applications under the Code of Criminal Procedure. —

Applications under the Code of Criminal Procedure (5 of 1898),

(1933) A I R 1933 P C 63 (64, 65) : 142 Ind Cas 7 : 54 All 1067 . 60 Ind App 13 (P C), *Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co., Ltd.*

[But see (1928) A I R 1928 Nag 194 (196) . 109 Ind Cas 559 : 24 Nag L R 100, *Sheikh Kandu v. Berar Ginning Co., Ltd.* (Application for winding up of a company is governed by this Article.)]

2a (1883) 7 Bom 213 (214), *Bas Manekbai v. Manekji Karasji.*

(1882) 6 Cal 707 (708) 8 Cal L R 52 5 Ind Jur 474, *In re Ishan Chander Roy.*

(1892) 19 Cal 48 (50), *Kashi Chundra Deb v. Gopalrishna Deb.*

(1931) A I R 1931 Cal 717 (718) . 135 Ind Cas 286, *Assawa Kumar v. Sukhaharan.*

(1931) A I R 1931 Cal 713 (714) : 135 Ind Cas 282, *Haimabati Mitra v. Kunja Mohan.* (For revocation of probate.)

(1916) A I R 1916 Cal 938 (942) . 33 Ind Cas 273, *Shyam Lal Ghose v. Rameswari Basu.* (Do.)

(1894) 17 Mad 379 (381), *Gnanamuthu Upadesi v. Vana Koul Pillai Nandan.*

(1885) 8 Mad 207 (208), *Janaki v. Kesavalu.* (For succession certificate)

(1911) 10 Ind Cas 130 (131) 1912 Pun Re No 20, *Inder Narain v. Onkar Lal.*

(1868) 9 Suth W R 342 (343), *Puroma Soonduree Dossee v. Tara Soonduree Dossee* (Letters of administration.)

(1901) 4 Oudh Cas 224 (226), *Bichana v. Hira Lal* (Do)

[See (1916) A I R 1916 Low Bur 10 (11) 35 Ind Cas 950 . 8 Low Bur Rul 422, *Moolli Cassim v. Moolli Abdul Rahim* (Application under S 98 of Probate and Administration Act of 1881 for inventory)]

3 (1908) 31 Mad 24 (28) 8 Mad L Tim 19 . 17 Mad L Jour 441, *Sambasita Mudaliar v. Panchanada Pillai.* (Application to Court for delivery of possession under S. 40 of the Madras Revenue Recovery Act)

(1937) A I R 1937 Mad 31 (32) 167 Ind Cas 223 I L R (1937) Mad 495, *Co-operative Credit Society, Arungunam v. Chinnaswami Udayan.* (Application to enforce award of Registrar under the Co-operative Societies Act)

4. (1935) A I R 1935 Lah 982 (983) 17 Lah 891 160 Ind Cas 636, *Hussain Bakhsh v. Secretary of State.* (Proceedings under the Indian Telegraph Act for the determination of compensation)

(1934) A I R 1934 Cal 396 (397) 149 Ind Cas 1134, *Saktisaran Sinha v. Radha Raman Mandal* (Application under S 26-J, Pen Ten Act.)

(1914) A I R 1914 Lah 209 (209) 23 Ind Cas 397, *Afrat Ali v. Aman Ali.* (Sale by the Insolvency Court)

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such as under Section 195¹ or Section 517² or application for revision to the High Court against the order of an inferior Criminal Court,³ are not governed by this Article, not being applications under the Code of Civil Procedure. Moreover, rules of limitation are foreign to the administration of criminal justice and it is only by specific legislation that periods of limitation can be rendered applicable to criminal proceedings.⁴

24. Enlargement of time.—In respect of an application falling within the scope of this Article, the period of limitation prescribed by this Article may be enlarged or a fresh period computed by the application of Sections 14, 18, 19 or 20, *ante*.¹ Where a minor's next friend obtains a preliminary mortgage decree and the minor, on attaining majority, applies for a final decree after the period prescribed by this Article has expired, the application will be barred by time.² The reason is that Section 6 *ante* applies only to suits and to applications for *execution*.

As regards the application of Section 15 *ante* to an application falling under the scope of this Article, see Note 5 to Section 16 *ante* and the undermentioned case.³

Note 23

1. (1898) 10 All 850 (353) : 1898 All W N 92 (93) : 13 Ind Jur 86, *Queen-Empress v. Ajudhia Singh*.
- (1916) A I R 1916 Mad 1110 (1118) : 39 Mad 750 : 14 Ind Cas 305 : 13 Cri L Jour 209 (F B), *Bapu v. Bapu*.
2. (1924) A I R 1924 Lah 75 (75) : 4 Lah 49 : 73 Ind Cas 937 : 24 Cri L Jour 713, *Kanshi Ram v. Emperor*.
3. (1930) A I R 1930 Oudh 401 (401) : 126 Ind Cas 395 : 1930 Cri Cas 941 : 31 Cri L Jour 1012, *Naim Ata v. Emperor*.
4. (1898) 10 All 850 (352) : 1898 All W N 92 : 13 Ind Jur 86, *Queen-Empress v. Ajudhia Singh*.

Note 24

1. (1920) A I R 1920 Bom 208 (209) : 44 Bom 97 : 55 Ind Cas 967, *Ganpatrao Sultanrao v. Anandrao Jagdeo Rao* (Benefit of S. 14 given)
- (1932) A I R 1932 Cal 381 (382) : 137 Ind Cas 378, *Surja Kanta Das v. Jogendra Nath Dutt*. (Sec. 18 applied to an application to set aside a sale not falling within the scope of Art. 106.)
- (1924) A I R 1924 Mad 859 (859) : 84 Ind Cas 970, *Kallepalli Pallayya v. Bhimaraju*. (Do.)
- (1919) A I R 1919 Mad 709 (710) : 42 Mad 52 : 48 Ind Cas 298, *Subbalakshmi Ammal v. Ramalinga Chetty*. (Do)
- (1911) 10 Ind Cas 21 (22, 23) (Oudh), *Amir Chand v. Narsingh Naram*. (Case did not satisfy conditions of Section 14 and therefore time not enlarged.)
- 2 (1933) A I R 1933 Cal 508 (509) : 144 Ind Cas 768, *Pulin Chandra Sen v. Amin Miah*.
3. (1927) A I R 1927 Pat 105 (107) : 99 Ind Cas 959, *Mahabir Prasad Narayan Deo v. Chhota Nagpur Banking Association, Ltd.*

182.* For the execution of a decree or order of any Civil Court not provided for by article 183 or by section 48 of the Code of Civil Procedure, 1908.	Three years; or, where a certified copy of the decree or order has been registered, six years.	1. The date of the decree or order, or 2. (where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, or 3. (where there has been a review of judgment) the date of the decision passed on the review, or	Article 182
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Act of 1877, Article 179.

- 179.—For the execution of a decree or order of any Civil Court not provided for by No 180 or by the Code of Civil Procedure, Section 230
- Three years, or, where a certified copy of the decree or order has been registered, six years.
1. The date of the decree or order, or
 2. (where there has been an appeal) the date of the final decree or order of the Appellate Court, or
 3. (where there has been a review of judgment) the date of the decision passed on the review, or
 4. (where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution, of the decree or order, or
 5. (where the notice next hereinafter mentioned has been issued) the date of issuing a notice under the Code of Civil Procedure, Section 248, or
 - 6 (where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date

Explanation 1.—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 4 of this number shall take effect in favour only of such of the said persons or their representatives as it may be made by. But when the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-

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4. (where the decree has been amended) the date of amendment, or
5. (where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order, or

matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been

their representatives, shall take effect against them all.

Explanation II.—“Proper Court” means the Court whose duty it is (whether under Sections 226 or 227 of the Code of Civil Procedure or otherwise) to execute the decree or order.

Act of 1871, Articles 167 and 168.

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| <p>167.—For the execution of a decree or order of any Civil Court not provided for by No. 169.</p> | <p>Three years</p> | <p>The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court,</p> <p>or (where there has been a review of judgment) the date of the decision passed on the review,</p> <p>or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce, or keep in force, the decree or order,</p> <p>or (where the notice next hereinafter made has been issued) the date of issuing a notice under the Code of Civil Procedure, section two hundred and sixteen,</p> <p>or (where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date) the date so specified.</p> |
| <p>168.—For the execution of any such decree or order of which a certified copy has been registered under the Indian Registration Act.</p> | <p>Six years</p> | <p>The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court,</p> <p>or (where there has been a review of judgment) the date of the decision passed on the review.</p> |

6. (in respect of any amount, recovered by execution of the decree or order, which the decree-holder has been directed to refund by a decree passed in a suit for such refund) the date of such last-mentioned decree or, in the case of an appeal therefrom, the date of the final decree of the Appellate Court or of the withdrawal of the appeal, or²

7. (where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date.

Act of 1859 — Sections 20, 22 and 23.

Time for enforcing execution of judgment, &c., of a Civil Court not established by Royal Charter.

20. No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order, or to keep the same in force, within three years next preceding the application for such execution

Time for execution of a summary award of Civil Court or Revenue Authority

22. No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter, unless some proceeding shall have been taken to enforce such decision or award, or to keep the same in force, within three years next preceding the application for such execution.

Preceding Section not to apply to summary awards in force at the passing of this Act.

23. Nothing in the preceding Sections shall apply to any summary decision or award in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon or within two years next after the passing of this Act, whichever shall first expire

* Before the amendment of the Act by Act 9 of 1927, Clauses 5 and 6 of the third column were as follows

Clause 5. (where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order, or

6. (where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when the issue of such a notice is required by the Code of Civil Procedure, 1908, or

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Explanation I. — Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 5 of this article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed, jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all.

Explanation II. — “Proper Court” means the Court whose duty it is to execute the decree or order.

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5. Exclusion of time by reason of adjudication in insolvency.
6. Exclusion of time under Para. 11 of Schedule III of the Code of Civil Procedure.
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55. Application barred by limitation.
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62. Omission to give, or error in, date of decree.
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- 125. Application for payment out of monies lying in Court.

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- 126. Application for substitution of representatives.
- 127. Application for substitution of name of transferee of decree.
- 128. Other illustrative instances of step-in-aid.
- 129. "Final order."
- 130. Order transferring decree for execution.
- 130a. Order returning application.
- 131. Final order need not be in accordance with law.
- 131a. Retrospective operation of amendment of clause 5.

CLAUSE 6.

- 132. Clause 6.

CLAUSE 7.

- 133. Clause 7 — General.
 - 134. "Payment which the decree or order directs to be made at a certain date."
 - 135. "Certain date."
 - 136. Instalment decree.

EXPLANATION I.

- 137. Decree in favour of several persons.
- 138. Decree against several persons.
- 139. Judgment-debtor and his surety — Whether application for execution against one will save limitation against the other.
- 140. Decree for partition.
- 141. Decree partly joint and partly several against several defendants.
- 142. Several persons becoming entitled to, or liable under, decree after it is passed — Effect of application by or against one.

EXPLANATION II.

- 142a. Explanation II.

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- 143. Revival of application.
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- 145. Local or special law.
- 146. Effect of bar of limitation.
- 147. Res judicata as applied to questions of limitation in execution proceedings.

Other Topics

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- Amendment of decree—Whether includes amendment of verbal and clerical errors ... See Note 50, Pts. 3 to 7
- Amendment of decree after it is barred—Whether gives fresh start ... See Note 50, Pts. 9 to 16
- Amendment of decree without jurisdiction—Effect ... See Note 50, Pt. 20
- 'Appeal' in clause 2 need not be *bona fide* one ... See Note 33, Pt. 4
- Application by transferee of decree merely for being recognized as transferee ... See Note 78, Pts. 10, 11
- Application for execution—Meaning of ... See Note 10, Pt. 4
- Application for execution—What is not—Instances ... See Note 10, Pts. 5 to 9 & F-N (10)
- Application for execution by secured creditor—Not affected by insolvency proceedings against judgment-debtor ... See Note 5, Pt. 3
- Application for passing of final decree—Not an application in execution ... See Notes 11, 12, 13, 111
- Application to British Indian Court to transfer decree to foreign Court for execution according to laws of the foreign State—Whether step-in-aid ... See Note 107
- Application to take step-in-aid—Article 181 and not this Article applies ... See Note 2, Pt. 4
- Article 181 and this Article ... See Note 2, Pts. 1 to 3
- Clause 2—Appeal need not be decided on merits ... See Note 40, Pts. 8 to 10
- Clause 3—Review should have been granted for applicability of clause 3 ... See Note 48, Pts. 4, 5
- Clause 5—Applicability of—Conditions necessary ... See Note 51a
- Construction of this Article ... See Note 2, Pts. 7 to 13
- 'Date of amendment'—Meaning ... See Note 50, Pt. 19
- Decree against several defendants—Appeal by one of them alone—Effect ... See Note 35, Pt. 4
- Decree directing payment 'within' a certain period—Whether comes within clause 7 ... See Note 135, Pt. 8
- Decree not capable of execution—Article 182 does not apply ... See Note 11, Pt. 1a
- Decree not capable of execution on date of decree but becoming executable subsequently—Limitation ... See Note 26, Pts. 2 to 4
- Decree of Revenue Court—Application for execution—Whether Art. 182 applies ... See Note 19
- Ex parte* decree—Application to set aside dismissed—Appeal from such order—Limitation for execution of *ex parte* decree—Starting point ... See Note 34, Pts. 6, 7
- Insolvency of decree-holder—Period of insolvency proceedings cannot be excluded ... See Note 5, Pt. 2
- Instalment decree with default clause—Application for enforcement of default clause—Clause 7 does not apply ... See Note 136, Pts. 3, 4
- Instalment decree with default clause—Application for enforcement of default clause—Starting point ... See Note 136, Pts. 6 to 8
- Instalment decree with default clause—Application for instalments within three years of application but after three years of earliest default ... See Note 136, Pts. 9 to 11 and 13 to 15
- Limitation suspended against one of judgment-debtors on account of his insolvency—It will not be suspended against others also ... See Note 133, Pt. 13
- Order returning application for amendment—Whether 'final order' within clause 5 ... See Note 129, Pts. 16 to 20
- Order striking off proceedings—Effect ... See Note 143, Pts. 8 to 14
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- Relief not possible to be granted for want of particulars—Application not one in accordance with law ... See Notes 52, 72
- Revenue Court—Whether Civil Court ... See Note 19
- Step-in-aid—Whether pending execution application necessary ... See Note 100, Pts. 5 to 9
- Step-in-aid of execution—Essentials ... See Note 99

Article 182
Note 1

1. Legislative changes.

1. Law prior to 1859 :

Before the Act of 1859 was passed, there was no specific provision in any of the Regulations in force in the various Provinces prescribing any period of limitation for applications for the execution of decrees and orders. But the Courts adopted, as a matter of practice, a twelve years' rule of limitation in such cases.¹

2. Law under the Act of 1859 :

The Act of 1859 introduced provisions prescribing period of limitation for the execution of judgments, decrees and orders. By Section 20, it was provided that no process of execution should issue to enforce any judgment, decree or order unless the application for execution was made within three years —

(a) of some proceeding taken to enforce such judgment, decree or order, or

(b) of some proceeding taken to keep the same in force.²

Article 182 — Note 1

1. (1865) 5 Suth W R (Misc) 8 (9), *Prosunno Coomar Ghose v. Sham Lal Gungopadhyay*.

(1818) Select Reports by Macnaghten, Volume 2, page 360.

2. (1866) 6 Suth W R (Misc) 17 (18), *Kool Chunder Chuckerbutty v. Rumul Chunder Roy*.

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(1860) 2 All 792 (798) . 6 Cal L R 561 . 7 Ind App 167 : 3 Shome L R 211 : 4 Ind Jur 426 . 3 Suther 761 : 4 Sar 157 (P C), *Hira Lal v. Badra Das*.

(1874) 21 Suth W R 97 (100) : 13 Beng L R 169 (P C), *Benoderam Sen v. Brojendra Naram Roy*.

(1874) 22 Suth W R 512 (516, 517) : 14 Beng L R 143 (F B), *Eshen Chunder Bose v. Prannath Nag*.

(1870) 13 Suth W R 44 (48) : 4 Beng L R 101 (F B), *Kristo Komul Singh v. Huree Sirdar*.

(1870) 13 Suth W R 3 (4, 5) : 4 Beng L R 82 (F B), *Rhedoy Krishna Ghose v. Koylash Chunder Bose*.

As to what are proceedings in that Section, see the following cases :

(1870) 13 Moo Ind App 479 (488) . 14 Suth W R 21 : 5 Beng L R 611 : 2

(1870) 13 Moo Ind App 479 (488) . 14 Suth W R 21 : 5 Beng L R 611 : 2

(1870) 13 Moo Ind App 479 (488) . 14 Suth W R 21 : 5 Beng L R 611 : 2

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(1870) 13 Moo Ind App 479 (488) . 14 Suth W R 21 : 5 Beng L R 611 : 2

In the case of *summary* decisions and awards of Civil Courts, an exactly similar provision was made by Section 22 but with

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(A decree-holder should do something more than the mere presentation of a petition for execution to keep alive his decree)

(1866) 6 Suth W R (Misc) 63 (63), *Luckhee Narain v. Ram Chand*. (An application for execution followed by issue of notice was a proceeding to keep alive the decree.)

(1866) 6 Suth W R (Misc) 37 (37, 38), *Chunder Coomar Roy v. Ranees Shurut Soonduree Debia*. (An application for execution merely, without even notice of it to the other party, is not a proceeding which keeps the decree alive.)

(1881) 1881 Bom P J 151, *Sabaji v. Ganesh*. (An application only for costs cannot be deemed to be a *bona fide* endeavour to get the decree enforced.)

(1872) 18 Suth W R 190 (191), *Kaila Chand Paul v. Maharajah Dheeraj Mahatab Chand Bahadur*. (A "proceeding" under S 20 of Act 14 of 1859 must be a proceeding which is not at the time barred by limitation.)

(1869) 11 Suth W R 209 (209), *Radhoo Chowdhram v. Heet Lall Roy*.

(1871) 19 Suth W R 255 (260). 14 Beng L R 425 (Note), *Nadir Hossein v. Pearoo Thoudarinee*. (The proceeding need not be by a person legally and rightfully entitled to the decree.)

(1869) 12 Suth W R 436 (438) : 4 Beng L R A C 1, *Khaja Abdool Gann v. N. P. Pogose*.

(1871) 5 Mad H C R 453 (456), *Kendiga Mad Chetti v. Soobamma*.

(1874) 21 Suth W R 188 (188). 13 Beng L R App 1, *Sheikh Irshad Ali v. Radhu Shah*.

(1868) 10 Suth W R 216 (217), *Mahomed Saïed Durrani v. D. Ash Chowdhry*.

(1866) 5 Suth W F Chowdhry. (Do) be

served on a judgment-debtor is not a process to enforce a decree.)

(1869) 3 Beng L R App 33 (34), *Bhubaneswari Debi v. Mahendra Nath Chowdhry*. (Resistance to appeal or review is a proceeding.)

(1866) 5 Suth W R (Misc) 19 (19), *Syud Khan v. Jumal Bibee*. (Do)

(1868) 4 Mad H C R 32 (40), *Virasamy Mudali v. Manomany Ammal*. (Decree-holder resisting an application by judgment-debtor to set aside decree is not proceeding to keep decree alive.)

(1870) 13 Suth W R 208 (208), *Poornanund Surkhel v. Huro Soonduri*.

(1866) 6 Suth W R (Misc) 95 (95, 96), *Ram Rutton Banerjee v. Maharajah Ammeroolmoh Bunnaree Goind Bhadur*.

(1872) 18 Suth W R 7 (8), *Bulronath Chuckerbutty v. Rajah Nilmonee Singh Deo*.

(1871) 16 Suth W R 299 (300), *Nityanund Koondoo v. Nugendro Chunder Ghose*.

(1867) 7 Suth Bullub

(1865) 2 Suth W R (Misc) 3 (4), *Kashee Pershad Roy v. Shib Chunder Deb*. (Do)

(1867) 7 Suth W R 515 (519) Peng L R Sup Vol 709 (F D), *Kangaleechurn Ghosal v. Bonomallee Mullich*. (Do)

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this difference that the period of limitation was one year and

- (1866) 6 Suth W R (Misc) 14 (15), *Ram Coomar Chowdhry v. Brojessuree Chowdhrain.* (Do)
- (1872) 1872 Pun Re No 9, *Ram Singh v. Dadan Singh.* (Do.)
- (1865) 4 Suth W R (Misc) 24 (24), *Shureefoomissa v. Raj Kishen.* (Do.)
- (1874) 23 Suth W R 31 (33), *Pearce Soonduree Debia v. Bhudo Soonduree Debia.* (Do.)
- (1871) 15 Suth W R 207 (208), *Radha Gobind Shaha v. Brojendro Coomar Chowdhry.* (Do.)
- (1869) 11 Suth W R 205 (206); 7 Beng L R 706 (Note), *Tufuzzul Hossein Khan v. Bahadur Singh.* (Do)
- (1874) 1874 Pun Re No. 16, *Hansraj v. Harbaksh.* (Do)
- (1868) 9 Suth W R 240 (241), *Mohesh Chunder Biswas v. Taramonee Dassee.* (Proceeding against some only of judgment-debtors.)
- (1874) 1874 Pun Re No. 38, *Sarjan Mal v. Mamu.* (Do.)
- (1871) 1871 Pun Re No. 53, *Kurm Chund v. Gokul Chund.* (Where a decree is for land in two villages, execution of it in respect of land in one village is a proceeding to keep the decree in force in respect of land in the other village.)
- (1868) 9 Suth W R 330 (331), *Obhoy Churn Dutt v. Modhoo Soodun Chowdhry.* (Notice under S. 216, Civil Procedure Code of 1859)
- (1866) 5 Suth W R (Misc) 5 (5), *Girjanund Oopadhya v. Chuder Binod Oopadhya.* (Do.)
- (1866) 5 Suth W R (Misc) 5 (5), *Sham Chand Bysack v. Lucas Theodores Lucas.*
- (1884) 11 Cal 55 (59, 60), *Becha Ram Dutta v. Abdul Wahed.* (Proceedings in resistance of a claim to attach properties are proceedings.)
- (1872) 18 Suth W R 463 (463), *Khajah Mahomed Hossein Khan v. Syud Loof Ali Khan*
- (1869) 11 Suth W R 8 (9), *Ram Soondur v. Ram Kantlo.* (Rateable distribution — Proceedings in.)
- (1866) 6 Suth W R (Misc) 43 (43), *Fuzeelutoonissa v. Chuttur Dharee Singh.* (Attempt at settlement of accounts in Court is sufficient to keep a decree alive.)
- (1870) 13 Suth W R 141 (142); 4 Beng L R A C 158, *Naunhee Koonwar v. Kustoree Koonwar.* (Precept to the Collector under clause 2 of S. 24, Regulation 48 of 1793, for mutation of names in the terms of a decrees was a process to enforce the decree.)
- (1868) 10 Suth W R 337 (338), *Leak v. Daniel.* (Transmission of decree for execution.)
- (1866) 6 Suth W R (Misc) 60 (60), *Maharajah Dheraj Mahatab Chund Bahadoor v. Dino Moyee Debia.* (Do)
- (1867) 8 Suth W R 320 (321), *Mudan Bhukul v. Dooar Bharatee.* (Do.)
- (1866) 5 Suth W R (Misc) 16 (16), *Wym 109, Anund Mohun Surma Mojomdar v. Huro Chunder Bhattacharjee.* (Do.)
- (1879) 2 All 285 (286), *Raghu Ram v. Dannu Lal.* (Do.)
- (1867) Agr F B 156 (157) (F B), *Tellefey v. Peet Singh.* (Consent of the decree-holder to the striking off of an attachment is not a proceeding to enforce a decree.)
- (1877) 1 All 580 (583) (F B), *Fakır Muhammad v. Ghulam Hussain.* (An application by the decree-holder for the stay of execution proceedings)
- (1866) " " " " " "
- " " " " " "
- " " " " " "
- " " " " " "
- (1868) 10 Suth W R 240 (242), *Naram Acharjee Chowdhry v. Mohamaya Debia Chowdhrain.* (Proceedings between assignee of decree against third party.)
- (1868) 10 Suth W R 127 (127), *Drojo Lall Puramanick v. Ram Tarun Goswain.* (Steps taken towards placing the assignee of a decree in the position of the original decree-holder did not constitute proceedings to enforce, or to keep in force, the decree.)

not three.³Article 182
Note 1

The said two provisions were not to apply to judgments, decrees and orders in force at the time of the passing of the Act of 1859. As to these, process of execution could issue either within the time limited by law then in force or within three years (two years in the case of summary decisions and awards), next after the passing of the Act, whichever should first expire⁴ (Sections 21 and 23.)

(1873) 5 N W P H O R 100 (101), *Aboo Imam v. Bence Ram*. (Uncertified payment of instalments is not a proceeding.)

(1873) 19 Suth W R 226 (227), *Baboo Nath Jha v. Khugput Doss*.

(1868) 3 Agra (Misc) 5 (5), *Nawab Ammenood Deen Khan v. Moosuffer Hussein Khan*.

(1869) 11 Suth W R 210 (211), *Prasunno Chunder Roy v. Mookoond Pershad Roy*. (Defending claim suit.)

As to the starting point under that Section, see the following cases:

(1868) 4 Mad H C R 260 (261), *Ramanuja Aiyangar v. Venkatacherry*. (Limitation runs not from the date of a former application for process of execution to enforce the decree but from the date of the order upon the application.)

(1871) 15 Suth W R 51 (51), *Brojungona Dassee v. Shona Mookhee Dassee*. (Do.)

(1872) 18 Suth W R 76 (77) 11 Beng L R 23 (P C), *Dhunput Singh Roy v. Mudhomottee Debia*. (Do.)

(1868) 5 Bom H C R A O 214 (215), *Bapurau Krishna v. Madharav Ramrau*. (Time would run from date of appellate order where there has been appeal.)

(1866) 2 Agra 237 (239), *Sheo Jalum v. Gunesh*.

(1866) 6 Suth W R (Misc) 63 (63), *Maharajah Dhiraaj Mahatab Chund Bahadoor v. Baboo Buloram Singh*. (But the striking off of a case is not an act in furtherance of execution.)

(1866) 6 Suth W R (Misc) 63 (64), *Tainnee Churn Gangolly v. Tuluck Chunder Ghose*.

3. (1884) 10 Cal 196 (204) 7 Ind Jur 550 13 Cal L R 385 10 Ind App 119 4 Sar 454 (P C), *Mina Kanwars v. Juggat Setani*.

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(1868) 5 Bom H C R A C 102 (107), *Malunda Balacharya v. Sitaram*. (Do.)

(1870) 13 Suth W R (F B) 3 (5) 4 Beng L R 82 (F B), *Rhedoy Krishna Ghose v. Koylash Chunder Bose* (Do.)

(1866) 5 Suth W R (Misc) 20 (21), *Baroda Debia v. Sreeram Chowdhry*.

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- (1866) 6 Suth W R (Misc) 60 (60), Maharajah Dheraj Mahatab Chund Bahadoor v. Dino Moyee Debia. (Do.)
- (1867) 8 Su
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(1871) 15 Suth W R 51 (51), *Brojungona Dassee v. Shona Mookhee Dassee*. (Do.)

(1872) 18 Suth W R 76 (77) - 11 Beng L R 23 (P C), *Dhunput Singh Roy v. Mudhomottee Debia*. (Do.)

(1868) 5 Bom H C R A C 214 (215), *Bapurau Krishna v. Madhavrao Ramrao*. (Time would run from date of appellate order where there has been appeal.)

(1866) 6 Suth W R (Misc) 63 (63), *Maharajah Dhuraj Mahatab Chund Bahadoor v. Baboo Bulorani Singh*. (But the striking off of a case is not an act in furtherance of execution.)

(1866) 6 Suth W R (Misc) 63 (64), *Tarinee Churn Gangolly v. Tuluck Chunder Ghose*.

3. (1884) 10 Cal 196 (204) 7 Ind Jur 550 13 Cal L R 385 10 Ind App 119 : 4 Sar 454 (P C), *Mina Kanwar v. Juggat Setani*.

passing of Act 14, or without curtailing the period within which limitation under that Act bars a claim to revive a decree passed before the passing of the Act.)

(1866) 3 Bom H C R A C 175 (176), *Ex parte Kalidas Damodhar*. ("At the time of the passing of this Act" in Act 14 of 1859, must be construed to mean the time when the Act received the assent of the Governor-General of India.)

(1868) 5 Bom H C R A C 102 (107), *Mahunda Balacharya v. Sitaram*. (Do.)

(1870) 13 Suth W R (F B) 3 (5) : 4 Beng L R 82 (F B), *Rhedoy Krishna Ghose v. Koylash Chunder Bose*. (Do.)

(1866) 5 Suth W R (Misc) 20 (21), *Baroda Debia v. Scceram Chowdhry*.

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3. Act of 1871 :

Articles 167 and 168 of the Act of 1871 dealt with the limitation for the execution of decrees. The former dealt with the limitation for the execution of unregistered decrees, and the latter for the execution of registered decrees and orders.

The fourth clause of Article 167 corresponded to Section 20 of the Act of 1859 and provided that where an application "next hereinafter mentioned has been made," time ran from "the date of applying to the Court to enforce or to keep in force the decree or order."

It may be noted that both the Acts of 1859 and 1871 recognized applications *merely to keep in force* a decree or order, as furnishing a starting point of limitation.⁵ Such an application could not be made under the later Acts.⁶

4. Act of 1877 :

The words "or by the Code of Civil Procedure, section 230" in the first column of Article 179 of the Act of 1877 were newly added. In clause 4 in the third column of Article 179 of the Act of 1877, the words "in accordance with law to the proper Court for execution or to take a step-in-aid of execution" were substituted for the words "to the Court to enforce or to keep in force." The words "payment of an instalment" which occurred in clause 6 of the Act of 1871 were substituted in the Act of 1877, by the words "any payment."

5. Act of 1908 :

The words "or the withdrawal of the appeal" were newly added at the end of clause 2 of the Act of 1908. Clause 4 of

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- (1867) 7 Suth W R 330 (330), *Nowaraja Chowdhry v. Ram Kanaye Doss*.
 (1867) 8 Suth W R 88 (88), *Deegendur Narain Ghose v. Hurkishore Dutt*.
 (1867) 7 Suth W R 515 (518) : Beng L R Sup Vol 709 (F B), *Kangaleechurn Ghosal v. Bonomallee Mullick*.
 (1866) 6 Suth W R (Misc) 39 (40), *Huro Nath Bose v. Muddun Mohan Chuckerbutty*. (Section 21, Act 14 of 1859, was passed to give extension of time to decree-holders whose decrees would have been barred under the new law.)

The three years' period was from the date of the passing of the Act and not the date of the coming into force thereof. See the following cases :

- (1864) 1864 Suth W R (Misc) 27 (27), *Baboo Roghoonath Pershad v. Mt. Velaetee Begum*.
 (1864) 1 Suth W R (Misc) 9 (9), *Lulleet Ram v. Saligram Singh*.
 (1868) 4 Mad H C R 148 (149), *Virbhadra Rau v. M. Ramaya*.
 (1872) 1872 Bom P J 46, *Jethalal v. Naran*.
 (1869) 11 Suth W R 368 (369) : 3 Beng L R A C 40, *Bisthu Narayan Dandopadhyaya v. Ganga Narayan Biswas*.
 [See also (1866) 6 Suth W R (Misc) 14 (14), *Doorgachurn Roy v. Dno Moyee Debia*.
 (1866) 5 Suth W R (Misc) 17 (17), *Greggory v. Juggat Chuder Danerjee*]
 5. (1876) 25 Suth W R 546 (547), *Nilmoney Singh v. Nilcomul Tuppadar*.
 6. (1902) 26 Mad 760 (782, 783) : 13 Mad L Jour 412, *Rungiah Gounden & Co. v. Nanjappa Row*.

the Act of 1908 is new. Clause 5 of the Act of 1877 was re-enacted as clause 6 of the Act of 1908 with certain amendments.

6. Amendments after 1908 :

In clause 5, the words "the final order . . . made" were substituted by Act 9 of 1927 for the word "applying."⁷ Clause 6 was substituted for the old clause 6, which was deleted, in view of the amendment of clause 5 making time run from the date of the *final order* on applications for execution or to take some *step-in-aid* of execution.

Act 9 of 1927 came into force on the 1st January 1928. The amendment will not disturb vested rights. An application for execution of a decree after that date would be governed by the amended provisions, if the right of the decree-holder to execute his decree did not become barred on the 1st January 1928.⁸

2. Scope of the Article.—Article 181, *ante*, is a general Article applicable to applications for which no period of limitation is provided for elsewhere in the First Schedule. This Article is a special Article dealing with applications for the *execution* of decrees and orders. Where this Article is applicable, Article 181 cannot be resorted to, the general principle of interpretation of statutes being that a special provision will prevail over a general one.¹ Normally, an application for the execution of a decree or order will be governed by this Article and not by Article 181,² and it is only where there are definite circumstances which make this Article inapplicable that Article 181 may apply.³

An application for execution is not the same thing as an application to take a *step-in-aid of execution*. This Article does not govern the latter application which will, if no other Article is applicable to it, be governed by Article 181.⁴ Further, this Article is not exhaustive of all applications for execution.⁵ An application, though for execution, may yet not be covered by any of the clauses in the third

7. (1910) 7 Ind Cas 859 (859) (Mad), *Subramania Pillai v. Sanlara Subbu*

8. (1933) A I R 1933 Mad 85 (85) 140 Ind Cas 500, *Nagalingam Pillay v. Sivachudambara Sabapathy*.

(1930) 31 Cal W N 733 (734), *Kanai Lal Sabu v. Purnachandra Chatterjee*.

(1930) A I R 1930 Pat 207 (207) 127 Ind Cas 572, *Sapani Patra v. Damodar Kar*.

Note 2

1. See Note 24 of the Preamble to this Act.

2. (1935) A I R 1935 Pesh 129 (130) 158 Ind Cas 517, *Budhu Ram v. Mush-taq Shah*.

3. (1929) A I R 1929 All 606 (608) . 114 Ind Cas 894, *Mahammad Ishaq v. Baldeo Prasad*.

4. (1905) 10 Cal W N 351 (360) (FB), *Apurba Krishna Roy v. Chundermoney Debi*.

5. (1903) 26 Mad 780 (784) 13 Mad L Jour 412, *Runjah Goundan and Co. v. Nanjappa Row*.

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Note 2

column of the Article. In such cases, as has been seen in Note 25 to the Preamble, this Article cannot apply, with the result that Article 181 may apply.⁶

The Article should receive a fair and liberal and not too technical a construction so as to enable a decree-holder to obtain the fruits of his decree.⁷ Its language ought not to be strained in favour of the judgment-debtor who has not paid his just debt.⁸ Where words are fairly capable of two interpretations, one of which assists the decree-holder to obtain the fruits of his decree, and the other prevents him from obtaining the fruits of his decree, that interpretation which assists the decree-holder should be accepted.⁹ As a general rule, the Courts should lean to the view that the application is not barred.¹⁰ But Courts should not, in their anxiety to prevent justice being defeated by technicalities, overlook the danger of introducing uncertainty in the law by reason of such interpretation,¹¹ or condone the laches of the decree-holder when the application is clearly barred by limitation.¹² In the words of their Lordships of the Privy Council in *Maqbul Ahmad v. Onkar Pratab Narain Singh*,¹³ "it is impossible

(1933) A I R 1933 Oudh 209 (212, 213) : 143 Ind Cas 803 : 8 Luck 427, *Shyam Lal v. Nanruddin Beg.*

6. (1903) 26 Mad 780 (789) : 13 Mad L Jour 412, *Rungiah Goundan and Co. v. Nanjappa Row.*

See also Note 26, *infra*.

7. (1938) A I R 1938 Mad 323 (324) : 178 Ind Cas 749, *Annapurnamma v. Venkamma.*

(1916) A I R 1916 Mad 728 (730) : 39 Mad 923 : 30 Ind Cas 707, *Varadaraja Mudali v. Murugesam Pillai.*

(1927) A I R 1927 Nag 308 (309) : 103 Ind Cas 279 : 24 Nag L R 36, *Ramchandra v. Uka.*

(1919) A I R 1919 All 390 (390) : 41 All 479 : 50 Ind Cas 143, *Babu Ram v. Pearey Lal.*

(1918) A I R 1918 Mad 620 (621) : 41 Mad 251 : 41 Ind Cas 701, *Masilamani Mudaliar v. Sethuswami Iyer.*

(1916) A I R 1916 Mad 728 (730) : 39 Mad 923 : 30 Ind Cas 707, *Varadaraja Mudali v. Murugesam Pillai.*

(1900) 27 Cal 709 (712) : 4 Cal W N 681, *Sariatoolia Molla v. Raj Kumar.*

(1912) 16 Ind Cas 370 (371) (Cal), *Balaram Das Bhagat v. Raja Mukunada Deb.*

(1892) 5 Mad 141 (143), *Kunhi Mannan v. Seshagiri Bhalathan.*

8. (1938) A I R 1938 Mad 323 (324) : 178 Ind Cas 749, *Annapurnamma v. Venkamma.*

(1909) 1 Ind Cas 57 (60) (Cal), *Manorath Das v. Ambica Kanta Dose.*

See also cases cited in Foot-Note (7) above.

9. (1936) A I R 1936 Sind 138 (139) : 30 Sind L R 89 : 161 Ind Cas 1011, *Kishinchand Butamal v. Dhaniram Jamnadas.*

10. (1913) 18 Ind Cas 236 (237) (Lah), *Wali Ram v. Bhagwan Das.*

11. (1918) A I R 1918 Mad 620 (621) : 41 Mad 251 : 41 Ind Cas 701, *Masilamani Mudaliar v. Sethuswami Iyer.*

(1922) A I R 1922 Mad 79 (81) : 45 Mad 466 : 70 Ind Cas 321, *Kurpuswami Chettiar v. Rajagopala Iyer.*

[See also (1918) 35 Mad L Jour 38 (39) (N I C). (Critical Note on (1918) 41 Mad 251. A I R 1918 Mad 620.)]

12. See (1923) A I R 1923 Sind 14 (15) : 73 Ind Cas 311 : 17 Sind L R 255, *Sakerchand Narsidas v. Yacoob.*

13. (1935) A I R 1935 P C 85 (88) : 155 Ind Cas 205 : 62 Ind App 50 : 57 All 242 (P C).

to hold that in a matter which is governed by Act, an Act which in some limited respects, gives the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions "

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3. Applications by Government. — Section 17 of the Act of 1859 exempted from the operation of the Act, "any public claim whatever." Such claims continued, by the terms of the Section, to be governed by "the rules and laws of limitation now in force" It was held in the undermentioned case,¹ under the Act of 1859, that an application by the Government for the recovery of stamp duty by attachment and sale of the property of the person liable to pay such duty, was governed by the old rules of limitation in force at the time of the passing of the Act, which provided a period of sixty years for such matters,² and was therefore not barred.

There is no reservation in the later Acts in favour of the Government in the matter of execution proceedings. An application by the Government for execution must be made within the period prescribed by this Article³ Thus, an application by the Government to recover court-fees from a party is subject to the same period of limitation as the right of a subject to enforce a decree or order.⁴

4. Extension of time under the Sections of the Act. — The Articles in the Schedule must be read subject to the provisions of Sections 4 to 25 of the Act (see Section 3). In computing the period of limitation prescribed by this Article, therefore, regard must be had to the provisions of Sections 4 to 25, where such provisions are applicable to the particular application¹

Note 3

1. (1875) 8 Mad H C R 40 (43), *Collector of South Arcot v. Thathacharry*.
2. See Madras Regulation II of 1805, Section 2, clause 1.
3. (1874) 22 Suth W R 512 (512) (F B), *Collector of Dcerbhoom v Sreehury Chuckerbutty*
4. (1883) 7 Bom 552 (553) (Notes), *Venubai v Collector of Nasik*
(1881) 4 Mad 155 (156), *Appaya v. Collector of Vizagapatam*.

Note 4

1. *Applicability of Section 4 :*

See Note 1 to Section 4.

Applicability of Section 5

See Note 3 to Section 5.

Applicability of Section 6 :

See Notes 14, 15 and 35 to Section 6 and Notes 5, 6 and 15 to Section 7 and also the undermentioned cases.

(1925) A I R 1925 Cal 1216 (1218) 85 Ind Cas 1007, *Dejoy Cand Mahatab v. Nilmoni Lahiri* (Disability must exist when cause of action arises)

(1902) 1902 Pun L R No 131 1902 Pun Re No 100, *Allah Bakhsh v Bhatwani* (Subsequent disability does not affect the running of time)

irsuami Ayya v.
if a guardian has

nd Cas 379, *Sain-*

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Note 5

5. Exclusion of time by reason of adjudication in insolvency.—Section 78, sub-section 2 of the Provincial Insolvency Act, 5 of 1920, provides as follows :

“Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a

(1911) 12 Ind Cas 503 (505) (Mad), *Duraiswami Sastriar v. Venkatarama Iyer*.

(1934) A I R 1934 Cal 1 (3) : 149 Ind Cas 1062, *Satis Chandra Sen v. Jivan Lal Daga*.

Applicability of Section 12 :

See Note 3 to Section 12.

Applicability of Section 14 :

See Note 5 to Section 14, ante and the undermentioned cases :

(1890) 1890 Pun Re No. 154, *Mihr Jang Khan v. Faizulla Khan*. (Proceeding must be between the same parties)

(1923) A I R 1923 Rang 98 (98) : 79 Ind Cas 284, *F. N. Burn v. G. H. Paul*. (Proceeding must be for the same relief.)

(1887) 1887 All W N 198 (198), *Madho Rai v. Rajkals Kuar*. (The previous application must have been infructuous by reason of want of jurisdiction.)

(1901) 28 Cal 238 (241) : 5 Cal W N 150, *Sheik Jafar v. Kamalini Debi*. (Do.)

(1880) 2 All 792 (797) : 7 Ind App 167 : 6 Cal L R 561 : 4 Sar 157 : 3 Shome L R 211 : 4 Ind Jur 426 : 3 Suther 761 (P C), *Hira Lal v. Badri Das*. (Do.)

(1917) A I R 1917 All 370 (370) : 39 Ind Cas 796, *Ram Jas v. Ram Narain*. (Do.)

(1909) 2 Ind Cas 102 (105) : 1909 Pun Re No. 52, *Peachey v. Punjab Banking Company, Limited, Lahore*.

Applicability of Section 15 :

See Notes under Section 15, ante and the undermentioned cases :

(1926) A I R 1926 Mad 698 (699) : 95 Ind Cas 718, *Lalumia v. Masur Hannisa*. (Collateral proceeding—Time taken cannot be deducted.)

(1933) A I R 1933 Mad 418 (420) : 56 Mad 490 : 143 Ind Cas 1 (F B), *Tripura Sundaramma v. Abdul Khader*. (Do.)

Dhar. (Do.)

(1884) 1884 Pun Re No. 77, *Kurta Ram v. Kaithi Mal*. (Order granting time for payment is not order staying execution.)

Applicability of Section 19 ante :

See Note 63 to Section 19 and the undermentioned cases :

(1924) A I R 1924 Nag 147 (148) : 79 Ind Cas 66, *Daji Mahar v. Mahader Kumbi*. (A letter by judgment-debtor to decree-holder acknowledging his liability to pay the decretal amount is an acknowledgment within Section 19 and saves limitation for execution.)

(1933) A I R 1933 All 364 (366) : 55 All 893 : 146 Ind Cas 836, *Adya Prasad Singh v. Lal Girish Bahadur Pal*. (Do.)

(1930) A I R 1930 Cal 301 (305) : 124 Ind Cas 830, *Haatimulla v. Sulhamoy Chaudhuri*. (Acknowledgment of portion of the amount will save limitation as to whole.)

(1912) 13 Ind Cas 603 (604) (Cal), *Ram Pal Singh v. Nandlal Marwari*. (Insolvency petition specifying debt is a sufficient acknowledgment.)

(1937) A I R 1937 Mad 760 (763) : 174 Ind Cas 28, *Appaji Chetti v. Govindasami Reddi*. (Oral admission of payment in Court, and recorded by Court is not sufficient.)

suit or application in respect of which the leave of the Court was obtained under sub-section 2 of Section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded :

"Provided that nothing in this Section shall apply to a suit or application in respect of a debt provable but not proved under this Act."

It follows that in cases of intervening insolvency of the judgment-debtor the period during which the adjudication lasts will be excluded in computing the period of limitation for the execution of the decree against him.¹ But the benefit of the exclusion of time under the said Section is available only where execution is sought against an insolvent *judgment-debtor* and not where the insolvent is a *decree-holder* whose decree is sought to be executed.² An application for execution by a *secured* creditor is not affected by the insolvency proceedings against the judgment-debtor and consequently the period of insolvency cannot be excluded under Section 78 in computing the period of limitation for the application for execution.³

6. Exclusion of time under Para. 11 of Schedule III of the Code of Civil Procedure. — Paragraph 11 of Schedule III of the Code of Civil Procedure runs as follows :

"1. So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any

Applicability of Section 20 :

See Note 30 to Section 20 and also the following cases

(1933) A I R 1933 Mad 674 (674) 147 Ind Cas 586, *Chathukutty v. Raman* (Payment by one of several judgment-debtors on behalf of

others)

Note 5

1. (1932) A I R 1932 Oudh 69 (70) 134 Ind Cas 878 7 Luck 397, *Nalched Shah v. Kashmir Bank, Fyzabad*.
- (1930) A I R 1930 All 580 (582) 126 Ind Cas 16, *Sita Ram v. Kishan Lal*.
- (1924) A I R 1924 Pat 40 (40) 79 Ind Cas 696, *Akhaj, Khalifa v. Ram Lal Marwari*.
- (1931) A I R 1931 Pat 357 (358, 359) 131 Ind Cas 633 10 Pat 422, *Hst Narayan Singh v. Brij Nandan Singh*.
2. (1929) A I R 1929 Mad 715 (716, 717) 121 Ind Cas 455, *Rama Pillay v. Kasamuthu Nadar*.
3. (1929) A I R 1929 Oudh 71 (72) 113 Ind Cas 86 4 Luck 241, *Siri Ram Kuar v. Ram Prasad Ghosh*.

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process against such property or part in execution of a decree for the payment of money.

"2. During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

"3. The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived."

It was held in the undermentioned cases¹ that where the immovable property of the judgment-debtor was placed under the management of the Collector under the above paragraph, limitation for execution would be suspended for the period during which the property was under such management.

7. Exclusion of time under Section 3 of the Chota Nagpur Encumbered Estates Act (6 of 1876).—Section 3 of the Chota Nagpur Encumbered Estates Act, 1876, provides that as soon as an estate is taken charge of under the said Act, all proceedings pending in Civil Courts in respect of the debts of the disqualified owner shall be barred. But, under Section 12 of the Act, the debts so barred are revived when the estate is released. A decree-holder obtained a decree against the judgment-debtor on 19th April 1905. The estate of the judgment-debtor was in charge of the Encumbered Estates Department from 23rd May 1906 to 21st April 1908, on which last date it was released. The decree-holder applied for execution of his decree on 13th February 1909. It was held that the application was within time.¹

8. Application to execute decrees of Native States.—It is a general principle of international law that all *matters of procedure* are governed only by the *lex fori*, or the law of the *forum* in which the action is brought. Questions of limitation, being essentially matters of procedure, are governed only by the *lex fori*. Thus, if an application for execution of a decree, passed in a Native State, is made to a British Indian Court, it will be governed by this Act, and if it is barred thereunder, will be dismissed even though it may be within time according to the law of limitation applicable in the Native State in which the decree was obtained.

Note 6

1. (1910) 8 Ind Cas 377 (378) : 13 Oudh Cas 303, *Mohammad Abdul Karim Khan v. Nawaz Singh*.
- (1910) 7 Ind Cas 860 (860) (Mad), *Damara Kumara Thimmanayannu v. Ranga Bhupala*.
- (1893) 20 All 833 (395) : 1893 All W N 82, *Girdhar Das v. Har Shan'ar Prasad*.

Note 7

1. (1910) 7 Ind Cas 787 (788) : 38 Cal 239, *Protap Uday Narain v. Madan Mohan Nath*.

For further discussion, see Section 11 Note 2 *ante* and also the undermentioned case.¹

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9. Transfer of decree from one Court to another—Limitation for execution of.—Where a decree is transferred for execution to another Court under Section 43, Civil Procedure Code, and the two Courts are governed by different rules of limitation, the law applicable to an application for execution made to the transferee Court depends not on the character of the Court which *executes* the decree, but of the Court which passed it, though the manner of execution is that of the Court which executes the decree.¹ Thus, where a decree of a mufassil Court is transferred for execution to the Original Side of a Chartered High Court, the application for execution of such decree is governed by this Article and not by Article 183, *infra*.² As to the converse case of a decree passed on the Original Side of the High Court transferred to a mufassil Court, see Note 2, Pt. (1) to Article 183, *infra*.

10. "Application for the execution of any decree or order."

—Execution is the enforcement of decrees and orders by process of Court so as to enable the judgment-creditor to recover the fruits of the judgment.¹ The modes in which the Courts can execute their decrees and orders are set forth in Part II and Order 21, Schedule 1 of the Code of Civil Procedure.

The Acts of 1859 and 1871 referred to applications "to enforce" the decree or order. It was held in cases coming under those Acts that an application to "enforce a decree" was an application "under Section 212 (of the Code of 1859, now Order 21 Rule 11) or otherwise by which proceedings in execution are commenced and not applications of an incidental nature made during the pendency of such proceedings."² Thus, an application for the issue of a warrant pending an application for execution, was held not to be an application to "enforce the decree"³ An "application for the execution of a

Note 8

1. (1868) 10 Suth W R 10 (12) . Beng L R Sup Vol 970 (F B), *T. Leake v. W. Daniel*.

Note 9

1. (1890) 17 Cal 491 (497), *Tincowrie Dawn v. Debendra Nath Mookherjee*.
(1896) 24 Cal 473 (491), *Jogemaya Dass v. Thachomon Dass*.
(1868) 10 Suth W R 10 (12) Beng L R Sup Vol 970 (F B), *Leake v. Daniel*.

2. (1890) 17 Cal 491 (497), *Tincowrie Dawn v. Debendra Nath Mookherjee*.

Note 10

1. (1882) 9 Cal 773 (776, 777) : 7 Ind Jur 650, *Sreenath Roy v. Radhanath Mookherjee*.
2. (1878) 2 Mad 1 (4) 3 Ind Jur 208, *Prabakara Row v. Potannah*.
(1877) 3 Cal 235 (242) : 1 Cal L R 23 2 Ind Jur 400 (F B), *Chunder Coomar Roy v. Bhogobully Prosenno Roy*.
3. See cases cited under Foot-Note (2).

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decree or order" must, it is conceived, be similarly interpreted, and must be taken to mean an application under Order 21 Rule 11, or otherwise by which proceedings in execution are initiated,⁴ and not other applications made pending an execution proceeding, though such applications may operate as steps-in-aid of execution.

It has been held that an application under the Civil Procedure Code, Order 21 Rule 50, sub-rule 2 for leave to execute a decree (obtained against a firm) against a partner who was not personally served in the suit, is merely ancillary to an application for execution against him, that the latter application is governed by Article 182 and that so long as such application is not time-barred under that Article, the application for leave also will not be barred.^{4a} In the undermentioned case,^{4b} an application for leave itself was held to be an application for execution within Article 182.

The following applications are not applications for the execution of a decree or order :—

1. Application by a person merely for his being recognized as a transferee of a decree without a prayer for execution.⁵
2. Application for the transfer of a decree.⁶
3. Application by the decree-holder for the postponement of the execution sale on the ground that he had given time to the judgment-debtor.⁷
4. Application to Court to direct Collector to expedite partition proceedings.⁸

4. (1896) 18 All 492 (491) : 1896 All W N 142 (F B), *Rahim Ali Khan v. Phul Chand*.

4a (1932) A I R 1932 Bom 516 (519) : 140 Ind Cas 519, *Bhagwan Manaji v. Hiraji Premaji*.

(1931) A I R 1931 Lah 786 (789) : 13 Lah 327 : 131 Ind Cas 1026, *Bombay Company Limited, Karachi v. Kahan Singh*.

(1935) A I R 1935 Mad 926 (926) : 158 Ind Cas 907, *Kurpuswamy Iyer v. Ratulal Somabhai and Company*.

4b (1936) A I R 1936 Sind 183 (183, 189) : 30 Sind L R 88 : 164 Ind Cas 1011, *Kishin Chand Boota Mal v. Dhaniram Jamnadas*. (Dissenting from A I R 1936 Sind 180.)

5. (1912) 14 Ind Cas 704 (705) (Mad), *Somamma v. Basamma*.

6. (1935) A I R 1935 Lah 508 (510) : 17 Lah 13 : 158 Ind Cas 127, *Dets Das v. Mohammad Akbar Khan*.

(1926) A I R 1926 All 93 (94) : 90 Ind Cas 274 : 48 All 121, *Mt. Begam Sultan v. Mt. Sarai Begam*.

(1926) A I R 1926 All 478 (474) : 91 Ind Cas 482, *Mt. Sahodra v. Bhagwanadas*.

(1911) 9 Ind Cas 246 (246, 247) (Cal), *Raj Kumar Sen v. Annoda Charan*.

(1897) 20 All 78 (79) : 1897 All W N 168, *Sundar Singh v. Doru Shankar*.

(1895) 22 Cal 921 (923), *Suja Hossein v. Manohur Das*.

(1922) A I R 1922 Cal 3 (4) : 63 Ind Cas 116, *Harari Lal v. Daulyanath Saha*.

(1920) A I R 1920 All 390 (392) : 115 Ind Cas 865, *G. Atherton & Co. v. Hakeb Dalshah*.

7. (1881) 3 All 757 (755) : 1881 All W N 56, *Mainath Kuari v. Deli Dalshah Rai*.

8. (1914) A I R 1914 Sind 97 (98) : 8 Sind L R 335 : 29 Ind Cas 58, *Harun Khan Rahim Khan v. Tejmal Parmal*.

5. Application for attachment under Section 46 of the Civil Procedure Code.⁹

See also the undermentioned cases.¹⁰

Under the provisions of some special Acts, some demands have to be recovered "as if such demand is a decree of a Civil Court." In such cases the said words have been held to attract the whole procedure in execution with the result that the execution of orders would be governed by this Article.¹¹

11. Decree must be capable of execution. — If a decree is not in a form capable of execution, Article 182 does not apply and time does not run under the Act.^{1a} In *Rameshwar Singh v. Homeshwar*

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9 (1926) A I R 1926 Cal 249 (250). 90 Ind Cas 527, *Kasiwar De v. Aswini Kumar Pal*.

10. (1925) A I R 1925 All 646 (647); 87 Ind Cas 745, *Jaydeo Prasad v. Ghazi*. (The deposit of process fees for the issue of attachment in execution of a decree is not an application for execution.)

(1879) 1879 Bom P J 574, *Laldas Gokaldas v. Bhagwanji Jugaji*. (Do.)

(1876) 1876 Cal 1051 (1052). 1876 Ind Cas 1051 (1052). 1876 Ind Cas 1051 (1052).

(1883) 5 All 596 (598); 1883 All W N 143, *Shankaran v. Puri*.

(1880) 7 Cal L R 424 (428), *Jobraj Singh v. Bukoria Alumbasee Koer*. (Application for sale of property under attachment is not an application for execution.)

(1868) 9 Suth W R 390 (391), *Ramdhun Roy v. Abdool Gunnee*. (Application for restoration of execution case is not an application for execution.)

(1937) A I R 1937 Mad 779 (782, 784). 172 Ind Cas 468, *Ramaswami Chettiar v. Meyappan Sertai*. (Application for refund of purchase money is governed by Art. 181 and not by Art. 182.)

(1904) 27 All 378 (380); 2 All L Jour 16; 1905 All W N 9, *Godu Ram v. Suraj Mal*.

11. (1935) A I R 1935 Mad 217 (218). 156 Ind Cas 747. 58 Mad 760, *President of the Board of Commissioners for H. R. E., Madras v. Shrirur Mutt*. (Recovery of contributions under Section 70 (2) of Madras Religious Endowments Act.)

(1939) A I R 1939 Mad 304 (304, 305), *Subba Rao v. Calicut Co-operative Urban Bank, Ltd.* (Award passed by the Registrar under Co-operative Societies Act.)

(1926) A I R 1926 Oudh 289 (289). 93 Ind Cas 631. 1 Luck 153, *People's Industrial Bank Ltd., Allahabad v. Mahesh Charan Sinha*. (Enforcement of order for contribution under the Companies Act.)

(1933) A I R 1933 Sind 78 (79). 142 Ind Cas 489. 27 Sind L R 109, *Achraj Singh Ram Singh v. Achrajram Sahni*.

Note 11

1a (1921) A I R 1921 Bom 260 (261). 45 Bom 952. 61 Ind Cas 159, *Dayabhai v. Das Ujam*.

(1927) A I R 1927 Pat 215 (217). 6 Pat 780. 102 Ind Cas 611, *Somar Singh v. Deonandan Prasad*.

(1893) 1893 Pun Re No 47, *Buta Singh v. Chand Singh*.

[See (1868) 4 Mad H C R 173 (174), *Gopala Setty v. Damodara Setty*. (Case under the Act of 1859)]

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Singh,¹ their Lordships of the Privy Council observed as follows :

"In order to make the provisions of the Limitation Act apply, the decree sought to be enforced must have been in such a form as to render it capable, in the circumstances, of being enforced."

Applications in respect of a decree which is not in a form capable of execution, as for instance applications for the passing of a final decree in terms of the preliminary decree, are not applications in execution of the preliminary decree and are not governed by this Article. See Notes 12 to 18, *infra*.

12. Application for final decree in suits for sale or foreclosure. — Where a decree was passed, prior to the Civil Procedure Code, 1908, under Sections 86 or 88 of the Transfer of Property Act, 1882, an application for an order absolute for sale of the mortgaged property under Sections 87 or 89 of the Transfer of Property Act, was regarded as one *for the execution* of the decree under Sections 86 or 88, and was held governed, for purposes of limitation, by Article 179 of the Act of 1877 corresponding to the present Article.¹ Under the Civil Procedure Code, 1908, a preliminary

1. (1921) A I R 1921 P C 31 (32) : 49 Ind App 17 : 59 Ind Cas 636 (P C).

Note 12

1. (1914) A I R 1914 P C 66 (67) : 36 All 350 : 23 Ind Cas 649 (P C), *Chaudri Abdul Majid v. Jawahir Lal*.
(1922) A I R 1922 P C 187 (190) : 49 Cal 203 : 49 Ind App 335 : 74 Ind Cas 660 (P C), *Sachindra Nath Roy v. Maharaj Bahadur Singh*.
(1890) 13 All 278 (280) : 1891 All W N 83 (F B), *Oudh Behari Lal v. Nagshar Lal*.
(1902) 25 Mad 244 (265, 269, 288) : 12 Mad L Jour 279 (F B), *Mallikarjunadu Setti v. Lingamurti Pantulu*.
(1909) 4 Ind Cas 42 (43) (Mad), *Veera Reddy v. Ramalinga Mudaly*.
(1917) A I R 1917 Mad 669 (669) : 34 Ind Cas 756, *Natesa Udayan v. Annasami Udayan*.
(1908) 31 Mad 68 (69, 70) : 3 Mad L Tim 254 : 17 Mad L Jour 506, *Ramayyan v. Kadir Bacha Sahib*.
(1916) A I R 1916 Mad 289 (289, 290) : 29 Ind Cas 237 : 39 Mad 544, *Mahomed Husain v. Abdul Kareem*.
(1921) A I R 1921 Mad 126 (131) : 61 Ind Cas 979, *Vaswanatha Sasirvar v. Seetalakshmi Ammal*.
(1901) 24 Mad 695 (702), *Venkatarama v. Chinna Ramayya*.
(1920) A I R 1920 Mad 286 (287) : 56 Ind Cas 563, *Ganapathiya Pillai v. Gopala Aiyar*.
(1898) 20 All 302 (304) : 1899 All W N 40, *Chunni Lal v. Harnam Das*.
(1899) 23 Bom 644 (650, 653) : 1 Bom L R 136, *Bhagwan v. Ganu*.
(1889) 12 All 61 (62) : 1889 All W N 193 (F B), *Kedar Nath v. Lalji Shahai*.
(1898) 20 All 357 (358) : 1898 All W N 71, *Parmeshri Lal v. Mohan Lal*.
(1892) 1892 All W N 5 (5), *Ram Kripal v. Sheo Shai*.
(1919) A I R 1919 Mad 969 (970) : 49 Ind Cas 732, *Ramaswami Reddi v. Sekhappa Reddi*.
(1906) 16 Mad L Jour 503 (504) : 1 Mad L Tim 294, *Appiah v. Rama Reddi*.
(1916) A I R 1916 Mad 937 (937) : 31 Ind Cas 9, *Singaravelu Pillai v. Sathanaiah Mudaliar*.
(1907) 29 All 279 (280, 281) : 1907 All W N 45 : 4 All L Jour 145, *Sri Ram v. Het Ram*.
(1905) 27 All 625 (625, 629) : 2 All L Jour 371 : 1905 All W N 126, *Baldeo Prasad v. Ilm Haidar*.

decree for sale or for foreclosure is not capable of execution.^{1a} It is now obligatory on the part of the holder of a preliminary decree to obtain a final decree, before he can proceed to execution. An application for a final decree in a mortgage suit under Order 34 Rule 5 of the Civil Procedure Code, 1909, is now an application in the *suit itself* and is not one for execution of the preliminary decree.²

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Note 12

- (1921) A I R 1921 Pat 185 (186) . 61 Ind Cas 4, *Kedar Nath Goenka v. Tarini Prasad Singh*.
 (1926) A I R 1926 Mad 816 (817) . 49 Mad 691 : 96 Ind Cas 607, *Ellarayan v. Rangaswami Iyer*.
 (1917) A I R 1917 Mad 815 (816) . 32 Ind Cas 39, *Balaji Rao v. Harirama Chetty*.
 (1916) A I R 1916 Cal 541 (542) . 29 Ind Cas 120, *Krishna Bar v. Ranamoy Deb*.
 (1906) 33 Cal 867 (875, 876) . 4 Cal L Jour 141, *Purna Chandra Mandal v. Radha Nath Dass*.
 (1895) 22 Cal 931 (934), *Tara Prasad Roy v. Bhobodeb Roy*.
 (1895) 22 Cal 425 (434), *Dwarka Nath Misser v. Barinda Nath Misser*.
 (1895) 22 Cal 924 (927), *Tiluck Singh v. Parsotam Proshad*.
 (1918) A I R 1918 Bom 217 (222) 43 Bom 309 . 46 Ind Cas 107, *Narsinga Rao v. Bandu*.
 (1901) 1 All L Jour 15 (17), *Udit Narain v. Jagannath*.
 [But see (1902) 24 All 542 (545) 1902 All W N 160, *Ali Ahmed v. Nasiran Bibi*. (But since preliminary decree was not capable of execution, Art. 179 does not apply but Art. 178 applies)
 (1894) 21 Cal 818 (823), *Ajudhia Pershad v. Baldeo Singh*.
 (1902) 26 Mad 780 (784) : 13 Mad L Jour 412, *Rungiah Gounden and Co. v. Nanjappa Row*. (Do)]
- 1a (1926) A I R 1926 Mad 415 (416) : 93 Ind Cas 99, *Bulker Bee v. Md Umar*.
 2. (1914) A I R 1914 P C 150 (152) 42 Cal 776 42 Ind App 88 27 Ind Cas 683 (P C), *Munna Lal Farruck v. Sarat Chunder Mukerjee*.
 (1917) A I R 1917 All 163 (163) 39 All 641 42 Ind Cas 93 (S B), *Gajadhar Singh v. Kishen Jivan Lal*.
 (1922) A I R 1922 All 883 (883) 44 All 668 75 Ind Cas 485, *Sital Singh v. Baijnath Prasad*.
 (1918) A I R 1918 All 76 (77) 40 All 203 . 43 Ind Cas 870, *Nizamuddin Shah v. Bohra Bhim Sen*.
 (1917) A I R 1917 All 119 (119) 39 All 532 . 40 Ind Cas 424, *Ramji Lal v. Karan Singh*.
 (1915) A I R 1915 All 836 (337) . 38 All 21 : 30 Ind Cas 494, *Madho Ram v. Nihal Singh*.
 (1913) 18 Ind Cas 731 (732) . 35 All 178, *Badri Narayan v. Kunj Behari Lal*.
 (1927) A I R 1927 Bom 82 (35) 50 Bom 730 98 Ind Cas 943, *Moru Narushet Gujar v. Gangabas Rama Chandra*.
 (1923) A I R 1923 Bom 420 (421) 73 Ind Cas 187, *Harjivan Deiraj v. Gajanan Khashmath*.
 (1933) A I R 1933 Cal 793 (799) . 147 Ind Cas 249, *Harikar Prosad Das v. Umesh Chandra Das*.
 (1921) A I R 1921 Cal 551 (552) 59 Ind Cas 177, *Bhutanath Jana v. Tara-chand Jana*.
 (1917) A I R 1917 Cal 175 (175) 37 Ind Cas 802, *Sashi Bhusan Das v. Pratur Chandra Roy*.
 (1916) A I R 1916 Cal 541 (542) . 29 Ind Cas 120, *Krishna Bar v. Sm. Ranamoy Deb*.
 (1916) A I R 1916 Cal 231 (233) . 28 Ind Cas 211, *Beni Singh v. Barhamdeo Singh*.
 (1902) 29 Cal 651 (653), *Framatha Chandra Roy v. Khetra Mohan Ghose*.
 (1926) 92 Ind Cas 299 (299) (Lab), *Mohan Singh v. Nathumal*.

Article 182
Note 13

13. Application for final decree in redemption suit.—An application for a final decree in a redemption suit is, as in the case of an application for a final decree in a suit for sale or foreclosure, one in the suit itself and not one for the execution of the preliminary decree.¹ But, is an application by the *mortgagor* praying that he may be allowed to make the payment and for recovery of the mortgaged property, one in execution of the preliminary decree? It was held in the undermentioned case² by the High Court of Bombay that the preliminary decree is, so far as the mortgagor himself is concerned, capable of execution, and that his application for recovery of possession on payment is one for execution of the preliminary decree governed by Article 182 of the Act. In the undermentioned cases³ arising under the Transfer of Property Act, 1882, a similar view was held. But a contrary view has been expressed in the case noted below.⁴ It was held that the preliminary decree in a suit for

- (1924) A I R 1924 Mad 890 (891) : 85 Ind Cas 808, *Athamsa Rowther v. Ganesan*.
 (1922) A I R 1922 Mad 65 (66) : 69 Ind Cas 366, *Venkataiah v. Venkata Subbiah*.
 (1918) A I R 1918 Mad 919 (920) : 41 Ind Cas 268, *Nimmala Mahankali v. Kallakuri Subba Rao*.
 (1918) A I R 1918 Mad 356 (356) : 45 Ind Cas 76, *Pattabirama Naidu v. Subramania Chetti*.
 (1916) A I R 1916 Mad 523 (523) : 39 Mad 488 : 29 Ind Cas 142, *Lakshmi Achi v. Subbarama Aiyar*.
 (1918) A I R 1918 Nag 63 (63) : 15 Nag L R 36 : 48 Ind Cas 934, *Vinayak Rao v. Baijnath Prasad*.
 (1917) A I R 1917 Oudh 91 (92) : 41 Ind Cas 858 : 20 Oudh Cas 205, *Jagdish Singh v. Ram Adhin Singh*.
 (1914) A I R 1914 Oudh 209 (209) : 17 Oudh Cas 347 : 25 Ind Cas 752, *Vidya-sagar v. Ratipal*.
 (1910) 8 Ind Cas 986 (987, 988) (Low Bur), *Ahmad Ali v. Maung Ton*.
 (1933) A I R 1933 Cal 508 (508) : 144 Ind Cas 768, *Pulin Chandra Sen v. Amin Mea Muzaffar Ahmad*.
 (1919) A I R 1919 Pat 134 (134) : 50 Ind Cas 544, *Ras Behari Singh v. Juman Lal*.
 (1918) A I R 1918 All 235 (286) : 45 Ind Cas 518 : 40 All 235, *Ahmad Khan v. Mt. Gaura*.

Note 13

1. (1930) A I R 1930 Mad 353 (353) : 125 Ind Cas 95, *Venkatarama Reddi v. Doddachariar*.
2. (1919) A I R 1919 Bom 53 (56) : 43 Bom 689 : 51 Ind Cas 924, *Vardeo v. Gopal*. (Application for extension of time is not one for execution but one for possession.)
3. (1904) 28 Mad 211 (213), *Pooparambal Dava v. Krishna Menon*. (Application for extension of time for payment is itself one for execution of the decree.)
 (1911) 9 Ind Cas 337 (338) : 14 Oudh Cas 10, *Jageshar Singh v. Dhagwan Bakhsh Singh*.
 (1892) 14 All 350 (353) : 1892 All W N 40, *Bandhu Bhagat v. Muhammad Taqi*.
 (1891) 16 Bom 490 (495, 496), *Narayan Govind v. Anandram Kojiram*.
 [But see (1907) 4 Low Bur Rul 83 (85, 86), *Maung Pe v. Ma Daw*. (Application for possession under S 89, T. P. Act, is not one for execution nor one in execution—Nor is it under the Civil Procedure Code.)]
4. (1920) A I R 1920 Upp Bur 43 (44, 45) : 54 Ind Cas 607 : 3 Upp Bur Ral 183, *Maung Tun Maung v. Ma Ywe*.

redemption is provisional and until it is made final, redemption cannot be permitted, that the Court is not absolved from the necessity of passing a final decree, and that there is no provision for the execution of the preliminary decree before it has been made final. It is submitted that this last view is correct.

Where a decree in a redemption suit is not drawn up in the form specified by Order 34 Rule 7, Civil Procedure Code, the decree will not be considered to be a preliminary decree, and time for the execution of such decree will run from the date thereof.⁵

14. Application for ascertainment of mesne profits.— Under the provisions of Section 244 of the Code of Civil Procedure, 1882, any question relating to the ascertainment of mesne profits as to which the decree directed an inquiry, was to be determined by the *executing* Court.^{1a} The said provisions have been omitted in the present Civil Procedure Code, with the result that such inquiry is no longer a proceeding in execution but is one in the *suit* itself. The award of mesne profits in all cases is to be by a *preliminary* decree, and when ascertained, they are to be embodied in a *final* decree. An application for the ascertainment of mesne profits is therefore not an application for execution of a decree.¹

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5. (1924) A I R 1924 Lah 635 (635, 636) 76 Ind Cas 144, *Mahabir Pershad v. Kartar Singh*. (Decree for possession on payment of a certain amount within a certain time is not a preliminary decree)
(1913) 18 Ind Cas 48 (49): 1913 Pun Re No. 68, *Naram Das v. Udham Singh*. (Decree not providing any period for payment — Order 34 Rule 7, O. P. C., not complied with.)
(1909) 1 Ind Cas 71 (72) (Cal), *Krishna Chandra Mandal v. Jakeral Haq*.

Note 14

- 1a (1925) A I R 1925 P C 117 (117) 88 Ind Cas 482 4 Pat 507: 52 Ind App 188 (P O), *Kedar Nath Goenka v. Anant Prasad Singh*.
(1907) 7 Cal L Jour 301 (302) 12 Cal W N 3, *Upendra Chandra Singh v. Sakhi Chand*.
(1900) 28 Cal 242 (245), *Ram Kishore Ghose v. Gopi Kant Shaha*.
(1887) 8 Cal 89 (91) 10 Cal L R 272, *Hem Chunder Chowdhry v. Brojo Soondury Debee*.
(1875) 24 Suth W R 339 (340), *Wodoy Tara Choudhain v. Syud Abdool Jubbah Choudhury*.
(1923) A I R 1923 Bom 866 (867) 73 Ind Cas 233 47 Bom 778, *Sayad Yusuf Ali v. Sayad Amin*.
(1914) A I R 1914 Mad 526 (531) 37 Mad 186 18 Ind Cas 586, *Ramana Reddy v. Babu Reddi*.
1. (1891) 19 Cal 182 (189) (F B), *Puran Chand v. Roy Radha Kishen*.
(1934) A I R 1934 All 465 (467) 151 Ind Cas 755, *Naram Das v. Bhagwati Prasad*
(1925) A I R 1925 All 588 (590) 47 All 543 87 Ind Cas 822, *Rudra Pratap Singh v. Sarada Mahesh Prasad Singh*.
(1930) A I R 1930 Mad 30 (31) 53 Mad 838 124 Ind Cas 200, *Kemgam Swamy v. Subbamma*.
(1929) A I R 1929 Bom 217 (218) 118 Ind Cas 700, *Lakshmidas Anant v. Raraj Dhalaji*.
(1911) 11 Ind Cas 939 (940) 39 Cal 220, *Midnapore Zamindary Co., Ltd. v. Kumar Naresk Narain Roy*.
(1936) A I R 1936 Mad 801 (804) 164 Ind Cas 670, *Raria Rao v. Sree-ramamurthi*.

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Notes
15—16

15. Application for personal decree against mortgagor under Order 34 Rule 6 of the Civil Procedure Code.—An application for a personal decree against the mortgagor under Order 34 Rule 6 of the Civil Procedure Code, 1908, is not one for the execution of any decree against him.¹

16. Application by auction-purchaser for possession.—An application by a court auction-purchaser of property for possession of the property purchased, is not one for the execution of the decree within the meaning of this Article and is not governed by it.¹ This would be so even if the purchaser were the decree-holder himself.²

- (1929) A I R 1929 Pat 368 (368) : 8 Pat 482 : 117 Ind Cas 647, *Kamathya Narain Singh v. Akloo Singh*.
 (1923) A I R 1923 Bom 268 (269) : 77 Ind Cas 497, *Thana Zalalji v. Dhana Jachryi*.
 (1916) 24 Cal L Jour 23n (23n) (Jour).
 (1924) A I R 1924 Pat 781 (782) : 4 Pat 57 : 84 Ind Cas 272, *Harakhyan Missur v. Jagdeo Missur*.
 (1921) A I R 1921 Bom 404 (404) : 61 Ind Cas 448 : 45 Bom 819, *Gangadhar Manika v. Balakrishna Soreba*.
 (1910) 5 Ind Cas 272 (273) (Cal), *Debendra Nath Goswami v. Khirode Chandra Bandopadhyaya*.

Note 15

1. (1936) A I R 1936 Mad 34 (38) : 59 Mad 188 : 160 Ind Cas 270 (F B), *Palaniappa Chettiar v. Narayanan Chettiar*.
 (1923) A I R 1923 All 203 (204) : 79 Ind Cas 85, *Raj Narain Mal v. Sanli Lal*.
 (1928) A I R 1928 All 71 (72) : 50 All 321 : 108 Ind Cas 459, *Bisheshar Nath v. Chandu Lal*.
 (1918) A I R 1918 All 105 (106) : 40 All 551 : 47 Ind Cas 562, *Mohamad Illifat Husain v. Alimunnissa*.
 (1906) 28 All 660 (664) : 3 All L Jour 445, *Gajadhur Lal v. Alliance Bank of Simla, Ltd.*
 (1913) 21 Ind Cas 530 (530) (Mad), *Rama Venkatasubba Iyer v. Shanmukam Pillai*.
 (1899) 21 All 453 (454) : 1899 All W N 166, *Ram Sarup v. Ghaurani*.
 (1906) 83 Cal 867 (870, 876) : 4 Cal L Jour 141, *Purna Chandra Mandal v. Radha Nath Das*.
 (1892) 14 All 513 (517) : 1892 All W N 60, *Musaheb Zaman Khan v. Inayat-ullah*.
 (1925) A I R 1925 Cal 834 (836) : 52 Cal 828 : 89 Ind Cas 1 (F B), *Francis Higgins Pell v. Minnie Gregory*.
 (1911) 10 Ind Cas 21 (22) (Oudh), *Amir Chand v. Narsingh Narain*.

Note 16

- 1 (1935) A I R 1935 Mad 603 (608) : 58 Mad 893 : 159 Ind Cas 279 (F B), *Abdul Aziz Sahib v. Chokkan Chettiar*.
 (1909) 1 Ind Cas 993 (993, 999) : 32 Mad 136, *Sultan Sahib Marhayer v. Chidambaram Chettiar*.
 2. (1909) 1 Ind Cas 416 (419) : 31 All 82 (F B), *Mt. Bhagwati v. Banwari Lal*.
 (1935) A I R 1935 Mad 603 (608) : 58 Mad 893 : 159 Ind Cas 279 (F B), *Abdul Aziz Sahib v. Chokkan Chettiar*.
 (1928) A I R 1928 All 368 (370) : 50 All 670 : 115 Ind Cas 863, *Mohann Parakkhan v. Hasder Balksh*.
 (1919) A I R 1919 Mad 1001 (1002) : 43 Ind Cas 155, *Nandur Sultayya v. Venkatramayya Apparao*.
 (1917) A I R 1917 Mad 979 (979) : 32 Ind Cas 993, *Ramaswami Aiyar v. Abdul Aziz Sahib*.

17. Application for final decree in partition suit.—Order 20 Rule 18, Civil Procedure Code, provides that the Court may, in respect of immovable property not being an estate assessed to the payment of revenue to the Government, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required. After such a preliminary decree has been passed in a partition suit, the proper course for the plaintiff desiring an absolute separation of his share, is to apply for a final decree.¹ Such an application is not one for execution.² There is in fact no limitation for such an application, inasmuch as the Rule does not contemplate any such application being made by the party, it being the duty of the Court to pass the final decree after the necessary enquiries.³

18. Application for restitution.—See Note 7 to Article 181, *ante*, and the undermentioned cases.¹

19. "Civil Court."—This Article will apply only where the decree or order sought to be executed is that of a Civil Court. Is a Revenue Court a Civil Court within the meaning of this Article?

(1924) A I R 1924 Bom 429 (431) . 48 Bom 550 . 63 Ind Cas 932 (F B), *Hargovind Fulchand v. Bhudar Rao*;

(1933) A I R 1933 Mad 745 (746) : 145 Ind Cas 397, *Appaico-Nainar v. Lakshmana Reddi*.

(1927) A I R 1927 Nag 294 (295) . 103 Ind Cas 335, *Balaji Kashinath v. Anandrao*.

(1902) 28 Mad 740 (741) : 13 Mad L Jour 237, *Kattayat Pathumay v. Raman Menon*.

Note 17

1. (1929) A I R 1929 Oudh 456 (457) 5 Luck 280 121 Ind Cas 287, *Lalta Prasad v. Brahma Din*

2 (1933) A I R 1933 Pesh 101 (104) 146 Ind Cas 201, *Faqirchand v. Mohamad Akbarkhan*.

(1929) A I R 1929 Oudh 117 (120) 112 Ind Cas 205, *Bisheshwar Gir Goshain v. Satish Chandra Chatterjee*.

(1898) 20 All 311 (314) . 1898 All W N 45, *Shah Muhammad Khan v. Hanwant Singh*.

(1907) 1907 Pun L R No. 86 . 1906 Pun Re No 47, *Durga Das v. Fakir Chand*.

(1930) A I R 1930 Mad 528 (533) 53 Mad 378 131 Ind Cas 160, *Ramathan Chetty v. Alagappa Chetty*

(1918) A I R 1918 Mad 751 (755) 40 Ind Cas 820, *Sethurama Sahib v. Chotta Raja Sahib*.

(1916) A I R 1916 Mad 809 (810) 30 Ind Cas 380, *Srinivasa Mudali v. Ramaswamy Mudali*

(1907) 17 Mad L Jour 20 (20) (N R C)

(1921) A I R 1921 Pat 296 (297) 59 Ind Cas 672, *Krishna Lal Jha v. Mandeswar Jha*

(1904) 2 Mad L Tim 265 (266), *Ramaswamy Natchar v. Ramaswamy Kamaya Natchar*.

3. (1933) A I R 1933 Pesh 101 (104), 146 Ind Cas 201, *Faqirchand v. Mohamad Akbar Khan* (A I R 1920 Oudh 231 (232), Followed)

Note 18

1 (1939) A I R 1939 Lah 73 (76) I L R 1938 Lah 571, *Punjab National Bank, Ltd., Delhi v. Firm Nanhe Mal Janikdas*.

(1923) A I R 1923 Nag 101 (101) : 18 Nag L R 200 76 Ind Cas 255, *Sonba v. Parasharam*.

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15. Application for personal decree against mortgagor under Order 34 Rule 6 of the Civil Procedure Code.—An application for a personal decree against the mortgagor under Order 34 Rule 6 of the Civil Procedure Code, 1908, is not one for the execution of any decree against him.¹

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(1929) A I R 1929 Pat 368 (368) : 8 Pat 482 : 117 Ind Cas 647, *Kamakhyia Narain Singh v. Ahloo Singh*.

(1923) A I R 1923 Bom 268 (269) : 77 Ind Cas 497, *Thana Zalalji v. Dhand Javhrji*.

(1916) 24 Cal L Jour 23n (28n) (Jour).

(1924) A I R 1924 Pat 781 (782) : 4 Pat 57 : 84 Ind Cas 272, *Harakhpan Missir v. Jagdeo Missir*.

(1921) A I R 1921 Bom 404 (404) : 61 Ind Cas 448 : 45 Bom 819, *Gangadhar Manika v. Balakrishna Siroba*.

(1910) 5 Ind Cas 272 (273) (Cal), *Debendra Nath Goswami v. Khirode Chandra Bandopadhyaya*.

Note 15

1. (1936) A I R 1936 Mad 34 (38) : 59 Mad 188 : 160 Ind Cas 270 (F B), *Palamappa Chettiar v. Narayanan Chettiar*.

(1923) A I R 1923 All 203 (204) : 79 Ind Cas 85, *Raj Narain Mal v. Santi Lal*.

(1928) A I R 1928 All 71 (72) : 50 All 321 : 108 Ind Cas 459, *Bisheshwar Nath v. Chandu Lal*.

(1918) A I R 1918 All 105 (106) : 40 All 551 : 47 Ind Cas 562, *Mohamad Ilfat Husain v. Alimunnissa*.

(1906) 28 All 660 (664) : 3 All L Jour 445, *Gajadhar Lal v. Alliance Bank of Simla, Ltd.*

(1913) 21 Ind Cas 530 (530) (Mad), *Rama Venkatasubba Iyer v. Shanmukam Pillai*.

(1899) 21 All 453 (454) : 1899 All W N 166, *Ram Sarup v. Ghaurani*.

(1906) 33 Cal 867 (870, 876) : 4 Cal L Jour 141, *Purna Chandra Mandal v. Radha Nath Das*.

(1892) 14 All 513 (517) : 1892 All W N 80, *Musaheb Zaman Khan v. Inayat-ullah*.

828 : 89 Ind Cas 1 (F B), *Francis Chand v. Narsingh Narain*.

Note 16

1 (1935) A I R 1935 Mad 803 (808) : 58 Mad 893 : 159 Ind Cas 279 (F B), *Abdul Aziz Sahib v. Chokkan Chettiar*.

(1900) 1 Ind Cas 993 (993, 999) : 32 Mad 136, *Sultan Sahib Markayar v. Chidambaram Chettiar*.

2. (1900) 1 Ind Cas 416 (419) : 31 All 82 (F B), *Mt. Bhagwati v. Banwari Lal*.

(1935) A I R 1935 Mad 803 (808) : 59 Mad 893 : 159 Ind Cas 279 (F B), *Abdul Aziz Sahib v. Chokkan Chettiar*.

(1928) A I R 1928 All 368 (370) : 50 All 670 : 115 Ind Cas 863, *Mohanna Barakhan v. Haider Bakhsh*.

(1919) A I R 1919 Mad 1001 (1002) : 43 Ind Cas 155, *Nandur Subbaya v. Venkataramayya Apparao*.

(1917) A I R 1917 Mad 979 (979) : 32 Ind Cas 993, *Ramaswami Aiyar v. Abdul Aziz Sahib*.

17. Application for final decree in partition suit.—Order 20 Rule 18, Civil Procedure Code, provides that the Court may, in respect of immovable property not being an estate assessed to the payment of revenue to the Government, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required. After such a preliminary decree has been passed in a partition suit, the proper course for the plaintiff desiring an absolute separation of his share, is to apply for a final decree.¹ Such an application is not one for execution.² There is in fact no limitation for such an application, inasmuch as the Rule does not contemplate any such application being made by the party, it being the duty of the Court to pass the final decree after the necessary enquiries.³

18. Application for restitution.—See Note 7 to Article 181, ante, and the undermentioned cases.¹

19. "Civil Court."—This Article will apply only where the decree or order sought to be executed is that of a Civil Court. Is a Revenue Court a Civil Court within the meaning of this Article?

(1921) A I R 1924 Bom 429 (431) · 48 Bom 550 · 63 Ind Cas 932 (F B), *Hargovind Fulchand v. Bhudar Raoji*.

(1933) A I R 1933 Mad 745 (746) · 145 Ind Cas 397, *Apparao Nainar v. Lakshmana Reddi*.

(1927) A I R 1927 Nag 294 (295) · 103 Ind Cas 335, *Balaji Kashinath v. Anandrao*.

(1902) 26 Mad 740 (741) · 13 Mad L Jour 237, *Kattayat Pathumay v. Raman Menon*.

Note 17

1. (1929) A I R 1929 Oudh 456 (457) · 5 Luck 280 · 121 Ind Cas 237, *Lalta Prasad v. Brahma Din*

2 (1933) A I R 1933 Pesh 101 (104) · 146 Ind Cas 201, *Faqirchand v. Mohammad Akbar Khan*

(1929) A I R 1929 Oudh 117 (120) · 112 Ind Cas 205, *Bisheshwar Gir Gosham v. Satish Chandra Chatterjee*.

(1898) 20 All 311 (314) · 1898 All W N 45, *Shah Muhammad Khan v. Hanwant Singh*

(1907) 1907 Pun L R No. 86 · 1906 Pun Re No 47, *Durga Das v. Fakir Chand*.

(1930) A I R 1930 Mad 528 (533) · 53 Mad 378 · 131 Ind Cas 100, *Ramathan Chetty v. Alagappa Chetty*.

(1918) A I R 1918 Mad 751 (755) · 40 Ind Cas 620, *Sethurama Sahib v. Chotia Raja Sahib*.

(1916) A I R 1916 Mad 809 (810) · 30 Ind Cas 880, *Srinivasa Mudali v. Ramaswamy Mudali*

(1907) 17 Mad L Jour 20 (20) (N R C)

(1921) A I R 1921 Pat 296 (297) · 59 Ind Cas 672, *Krishna Lal Jha v. Mandeswar Jha*

(1904) 2 Mad L Tim 265 (266), *Ramaswamy Naicker v. Ramaswamy Kamaya Naicker*

3. (1933) A I R 1933 Pesh 101 (104), 146 Ind Cas 201, *Faqirchand v. Mohammad Akbar Khan* (A I R 1920 Oudh 231 (232), Followed)

Note 18

1 (1939) A I R 1939 Lah 78 (76) · I L R 1939 Lah 571, *Punjab National Bank, Ltd., Delhi v. Firm Nanhe Mal Janikdas*.

(1923) A I R 1923 Nag 101 (101) · 18 Nag L R 200 · 76 Ind Cas 255, *Somba v. Parasharam*.

Article 182
Notes
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Though there is a certain distinction between the terms "Civil Courts" and "Revenue Courts" in that the former means Courts exercising all the powers of a Civil Court, as distinguished from Revenue or *Rent Courts* which only exercise powers over suits of a limited class, the latter are also Civil Courts in the sense that they decide civil questions between persons seeking their civil rights.¹ It is therefore conceived that an application for the execution of a decree of a Revenue Court will be governed by this Article, provided that the special or local law, if any, governing the case, does not prescribe any period of limitation for such an application. For, if such special or local law does prescribe a period of limitation different from that prescribed in this Article, it is that period that will apply, having regard to Section 29, *ante*, and not the period prescribed by this Article.

20. "Decree."—A "decree" is defined as follows by Section 2 sub-section 2 of the Code of Civil Procedure :

"'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144 but shall not include —

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order for dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

21. "Order."—The word "order" has been defined by Section 2 sub-section 14 of the Code of Civil Procedure as meaning "the

Note 19

1. (1882) 9 Cal 295 (300, 301) : 12 Cal L R 311 : 9 Ind App 174 : 4 Sar 392 : 6 Ind Jur 547 : 5 Shome L R 130 (P C), *Nilmoni Singh Deo v. Taranath Mulherjee*.
- (1910) 7 Ind Cas 787 (788) : 38 Cal 288 (292), *Protap Udai Narain v. Madan Mohan Nath*.
- (1902) 26 Mad 518 (520) : 13 Mad L Jour 296, *Veerasamy v. Manager, Pittapur Estate*.
- (1883) 5 All 406 (411) : 1883 All W N 92 (F D), *Madho Prakash Singh v. Murlis Manohar*.
- (1900) 1 Ind Cas 933 (934) : 36 Cal 252 (254), *Ram Lochan Singh v. Duni Prasad Kumri*.

1. (1900) 1 Ind Cas 933 (934) : 36 Cal 252 (254) : 1 Ind Cas 933 (F D).
 v. *Dhup Singh*.
 (1900) 31 Mad 24 (26, 27) : 17 Mad L Jour 441 : 3 Mad L Tim 19, *Sambantra Mudaliar v. Panchanada Pillai*.]

formal expression of any decision of a Civil Court which is not a decree." The word occurs both in the first and the third columns of this Article. In the first column of the Article it obviously refers to orders *capable of execution*, for otherwise an application for execution cannot lie at all. The "order" referred to in the second clause of the third column need not be one capable of execution. See Note 40 *infra*. As to the meaning of the word "order" occurring in clause 5 of the third column, there is a conflict of opinion for which see Note 129 *infra*.

22. "Not provided for by article 183."—See Note 2 to Article 183 *infra*.

23. "Not provided for by section 48 of the Code of Civil Procedure, 1908."—The words "provided for" in column 1 of this Article do not apply so clearly to Section 48, Civil Procedure Code, as they apply to Article 183, because Section 48, Civil Procedure Code, does not deal with decrees of Courts to which this Article does not apply.^{1a} Section 48, Civil Procedure Code, only prescribes a maximum limit of time for execution and does not prescribe the period within which each application for execution is to be made.¹ The words mentioned above must therefore be construed to mean that where execution is barred by Section 48, Civil Procedure Code, execution cannot be allowed under this Article.² That is to say, if the question of absolute bar under Section 48, Civil Procedure Code, does not arise, then the ordinary limitation prescribed under this Article is applicable.³

See also Note 3 to Article 181 *ante*.

Note 23

1a. (1932) A I R 1932 All 351 (352) 54 All 622 138 Ind Cas 93, *Faqir Chand v. Kundan Singh*.

[See also (1922) A I R 1922 Mad 268 (270) 45 Mad 785 70 Ind Cas 396, *Subbarayan v. Natarajan*]

1. (1924) A I R 1924 All 263 (265) . 46 All 73 . 79 Ind Cas 603, *Surajman Chaudh v. Anjore Shukal*.

(1938) A I R 1938 Pat 401 (402) . 175 Ind Cas 558, *Ram Ranbijaya Prasad Singh v. Kesho Prasad Singh*.

(1932) A I R 1932 Oudh 220 (221) 138 Ind Cas 149, *Jag Mohan Tewari v. Mahadeo Prasad*.

(1889) 1889 Pun Re No. 109, *Behari Lal v. Baness*.

(1891) 1891 Pun Re No. 9, *Gholam Jilani v. Ganga Ram*

(1918) A I R 1918 All 216 (218) 40 All 198 . 44 Ind Cas 24, *Jurawan v. Mahabir Dube*.

2. (1932) A I R 1932 All 351 (352) 54 All 622 138 Ind Cas 93, *Faqir Chand v. Kundan Singh*.

3. (1879) 1879 Bom P J 573, *Mayaram v. Lalbhai*.

(1879) 1879 Bom P J 574, *Laldas v. Bhagwanji*.

(1915) A I R 1915 Bom 40 (41) 39 Bom 256 28 Ind Cas 478, *Balaram Pethalchand v. Maruti Deyji* (Fresh periods obtainable under Article 182 are controlled by S. 48 of the Civil Procedure Code)

[See also (1914) A I R 1914 Mad 526 (527) 37 Mad 156 18 Ind Cas 586, *Ramana Reddi v. Babu Reddi*]

[See (1891) 1891 Pun Re No. 128, *Jhanda v. Mehan Lal*.]

Article 182
Notes
19—21

Though there is a certain distinction between the terms "Civil Courts" and "Revenue Courts" in that the former means Courts exercising all the powers of a Civil Court, as distinguished from Revenue or Rent Courts which only exercise powers over suits of a limited class, the latter are also Civil Courts in the sense that they decide civil questions between persons seeking their civil rights.¹ It is therefore conceived that an application for the execution of a decree of a Revenue Court will be governed by this Article, provided that the special or local law, if any, governing the case, does not prescribe any period of limitation for such an application. For, if such special or local law does prescribe a period of limitation different from that prescribed in this Article, it is that period that will apply, having regard to Section 29, *ante*, and not the period prescribed by this Article.

20. "Decree."—A "decree" is defined as follows by Section 2 sub-section 2 of the Code of Civil Procedure :

"'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144 but shall not include —

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order for dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

21. "Order."—The word "order" has been defined by Section 2 sub-section 14 of the Code of Civil Procedure as meaning "the

Note 19

1. (1882) 9 Cal 295 (300, 301) ; 12 Cal L R 311 ; 9 Ind App 174 ; 4 Sar 392 ; 6 Ind Jur 547 ; 5 Shome L R 130 (P C), *Nilmoni Singh Deo v. Taranath Mukerjee*.
- (1910) 7 Ind Cas 787 (788) ; 39 Cal 268 (292), *Protap Uday Narain v. Madan Mohan Nath*.
- (1902) 26 Mad 518 (520) ; 18 Mad L Jour 296, *Veerasamy v. Manager, Pittapur Estate*.
- (1883) 5 All 406 (411) ; 1883 All W N 92 (F D), *Madho Prakash Singh v. Muri Manohar*.
- (1909) 1 Ind Cas 933 (934) ; 36 Cal 252 (254), *Ram Lochan Singh v. Beni Prasad Kumari*.

- (1909) 1 Ind Cas 933 (934) ; 36 Cal 252 (254) ; 1909 Ind Cas 583 (F D).
v. Bhup Singh.
 (1908) 31 Mad 24 (26, 28) ; 17 Mad L Jour 441 ; 3 Mad L Tim 10,
Sambasra Mudaliar v. Panchanada Pillai.]

formal expression of any decision of a Civil Court which is not a decree." The word occurs both in the first and the third columns of this Article. In the first column of the Article it obviously refers to orders *capable of execution*, for otherwise an application for execution cannot lie at all. The "order" referred to in the second clause of the third column need not be one capable of execution. See Note 40 *infra*. As to the meaning of the word "order" occurring in clause 5 of the third column, there is a conflict of opinion for which see Note 129 *infra*.

22. "Not provided for by article 183."—See Note 2 to Article 183 *infra*.

23. "Not provided for by section 48 of the Code of Civil Procedure, 1908."—The words "provided for" in column 1 of this Article do not apply so clearly to Section 48, Civil Procedure Code, as they apply to Article 183, because Section 48, Civil Procedure Code, does not deal with decrees of Courts to which this Article does not apply.^{1a} Section 48, Civil Procedure Code, only prescribes a maximum limit of time for execution and does not prescribe the period within which each application for execution is to be made.¹ The words mentioned above must therefore be construed to mean that where execution is barred by Section 48, Civil Procedure Code, execution cannot be allowed under this Article.² That is to say, if the question of absolute bar under Section 48, Civil Procedure Code, does not arise, then the ordinary limitation prescribed under this Article is applicable.³

See also Note 3 to Article 181 *ante*.

Note 23

1a (1932) A I R 1932 All 351 (352) 54 All 622 . 138 Ind Cas 93, *Faqir Chand v. Kundan Singh*

[See also (1922) A I R 1922 Mad 268 (270) 45 Mad 785 70 Ind Cas 306, *Subbarayan v. Natarajan*]

1. (1924) A I R 1924 All 263 (265) . 46 All 73 : 79 Ind Cas 605, *Surajman Chaube v. Anjore Shukal*.

(1938) A I R 1938 Pat 401 (402) 175 Ind Cas 558, *Ram Ranbijaya Prasad Singh v. Kesho Prasad Singh*.

(1932) A I R 1932 Oudh 220 (221) 138 Ind Cas 149, *Jag Mohan Tewari v. Mahadeo Prasad*.

(1889) 1889 Pun Re No. 100, *Behari Lal v. Baness*.

(1891) 1891 Pun Re No. 9, *Gholam Jilani v. Ganga Ram*.

(1918) A I R 1918 All 216 (218) 40 All 198 . 44 Ind Cas 21, *Juracan v. Mahabir Dube*

2. (1932) A I R 1932 All 351 (352) . 54 All 622 138 Ind Cas 93, *Faqir Chand v. Kundan Singh*

3. (1879) 1879 Bom P J 573, *Mayaram v. Lalbhai*

(1879) 1879 Bom P J 574, *Laldas v. Bhagwanji*.

(1915) A I R 1915 Bom 40 (41) 39 Bom 256 . 28 Ind Cas 478, *Balaram Fathchand v. Maruti Deyji* (Fresh periods obtainable under Article 182 are controlled by S. 48 of the Civil Procedure Code)

[See also (1914) A I R 1914 Mad 526 (527) 37 Mad 156 18 Ind Cas 586, *Ramana Reddi v. Babu Reddi*]

[See (1894) 1894 Pun Re No. 128, *Jhanda v. Mehan Lal*]

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(Clause 1)
Notes 24-25

24. Registered decree. — Where a certified copy of a decree or order has been registered, column 2 of this Article provides for a period of six years for an application for execution of the decree. The word "registered" in that column means registered under the Indian Registration Act, 16 of 1908.¹

In order therefore that the decree-holder may have the six years' period under this Article, the registration must have been made in accordance with the provisions of the Indian Registration Act.² Thus, where a copy of a decree is registered on being presented by an unauthorised person, the registration is invalid and the decree-holder cannot avail himself of the longer period given by this Article.³

Section 23 of the Indian Registration Act provides that a copy of a decree may be presented for registration within four months from the date on which the decree was made. In computing this period of four months, "the date on which the decree was made" should be taken to be the date on which the decree was signed and not the date on which the judgment was pronounced.⁴

CLAUSE 1.

25. Date of decree. — Order 20 Rule 7 of the Code of Civil Procedure provides as follows :

"The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree."

The words "date of the decree" in clause 1 of the third column of this Article, must therefore mean the date on which the judgment was pronounced and not the date on which the decree is actually drawn up and signed.¹ An application for execution of a decree must

Note 24

1. (1937) 41 Cal W N 915 (916), *Abdur Rahim v. Chhamiruddin*.
 [See (1875) 24 Suth W R 372 (372), *Raghoo Nandun Singh v. Cochran*. (This Article will not apply to a decree of which only a memorandum was registered under Act 20 of 1866 which did not contain a provision for registration of a copy of a decree or order.)
- (1883) 1883 Bom P J 168, *Bhagwant v. Janaki Bai*. (Do)]
2. (1937) 41 Cal W N 915 (916), *Abdur Rahim v. Chhamiruddin*.
- 3 (1903) 6 Oudh Cas 9 (14, 15), *Atal Bihari Lal v. Hiranchari Singh*.
4. (1937) 41 Cal W N 915 (916), *Abdur Rahim v. Chhamiruddin*.

Note 25

1. See the cases cited in Foot-Notes (2) and (3), *infra*.
 [See also (1937) 41 Cal W N 915 (916), *Abdur Rahim v. Chhamiruddin*.
 (1921) A I R 1921 Cal 1061 (1065) : 82 Ind Cas 746, *Giribala Dasi v. Bisrambar Halder*.
 (1920) A I R 1920 Cal 614 (614) : 59 Ind Cas 81, *Nooloor Chandra Mullick v. Rajani Kanta Ghose*.
 (1921) 34 Cal L Jour 491 (497), *Ram Kanas Pal v. Punna Chandra*.
 (1916) A I R 1916 Cal 511 (512) : 82 Ind Cas 741, *Anandram v. Nityananda Barham*.

be made within three years of the "date of the decree" as explained above, if the case is governed by clause 1 of this Article. It is not open to the parties in such cases to extend, by their agreement, the period of limitation with regard to its execution. Consequently, where a decree, the execution of which is governed by clause 1 of this Article, is adjusted between the parties and it is agreed that it should be executable as adjusted, an application for execution of the decree will be time-barred if made beyond three years of the date of the decree.²

Where, however, by the mistake of the Court, a decree bears a date different from the date of the judgment, and being misled thereby the decree-holder applies for execution within three years of the date as found in the decree, the execution application will be regarded as being in time on the principle of the maxim *actus curiæ neminem gravabit*—an act of the Court shall prejudice no man.³

"The date of the decree" has reference to the decree sought to be executed. Where there is a preliminary and a final decree in the case,

(1909) 8 Ind Cas 391 (392) (Cal), *Choto Rakhal Das Mazumdar v. Joyendra Narain Mazumdar*.

(1906) 3 Cal L Jour 291 (292), *Madan Mohan Das v. Nobin Kishore Deb*.

(1890) 1 Cal W N 93 (94), *Afzal Hossein v. Mt. Umda Bibi*.

(1891) 25 Cal 109 (110, 111), *Golam Gaffar Mandal v. Goljan Bibi*.

(1889) 17 Cal 347 (357) 16 Ind App 195. 18 Ind Jur 449 5 Sar 463 (P C), *Munguram Marwari v. Gursahai Nand*

(1923) A I R 1923 Pat 129 (130). 1 Pat 771. 75 Ind Cas 879, *Sagarmal Marwari v. Lachmisaran*.

(1915) A I R 1915 Mad 308 (308) 25 Ind Cas 67, *Narayanaswamy Thevar v. Krishnasami Pillai*

(1920) A I R 1920 Pat 111 (111) 57 Ind Cas 531 5 Pat L Jour 490, *Hira Lal Sahu v. Jamuna Prasad Singh*

(1916) A I R 1916 Pat 235 (236) 34 Ind Cas 501 1 Pat L Jour 359, *Surajdeo Narain Singh v. Musaharao Raut*

(1886) 1886 Bom P J 162, *Madharai v. Vithu*

2. (1915) A I R 1915 All 231 (232) 28 Ind Cas 331, *Ibrahimji v. Hasanuddin Khan*

(1883) 6 All 623 (625) 1884 All W N 207, *Ramlakhan Rai v. Bakhtaur Rai*.

(1881) 1881 All W N 118 (118), *Jiva Ram v. Husam Ali*.

(1935) 164 Ind Cas 416 (417) (Cal), *Sarada Prasad Ghose v. Rokeya Khatun Bibi*

(1874) 23 Suth W R 129 (130), *Ram Runjam Chuckerbutty v. Rajah Jowhurnumrah Khan*

(1872) 17 Suth W R 396 (393), *Bibee Meheroonissa v. Faneer Rowshun Jehan*

(1870) 13 Suth W R 44 (48) 4 Beng L R 101 (F B), *Kristo Komul Singh v. Huree Sirdar*

(1870) 13 Suth W R 164 (166), *Modhoomootty Debia v. Dhunput Singh*

(1882) 1882 Pun Re No 190, *Basuka Mal v. Sirdar Amar Singh*

(1876) 1876 Pun Re No 46, *Dwarika Das v. Ram Saru*

(1880) 1880 Pun Re No 48, *Sirdar Amir Singh v. Jockahir Singh*

(1905) 1905 Pun L R No. 27, *Naman Ram v. Muhammad Nawaz Khan*.

(1930) A I R 1930 Pat 615 (618) 10 Pat 173 123 Ind Cas 786, *Ganga Bishun Marwari v. Raghunath Prasad*

3 (1933) A I R 1933 Cal 239 (240) 141 Ind Cas 114 *Nahni Karti Ray v. Kamaraddi*

(1938) A I R 1938 Pat 149 (150) 174 Ind Cas 397, *Kali Prasad v. Bibi Aziz Fatma*.

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Note 25

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Note 28

and the decree sought to be executed is the final decree, the preliminary decree being incapable of execution, time will run from the date of the *final* and not from the date of the preliminary decree.⁴

X obtained a decree against *A, B* and *C*, the decree so far as *C* was concerned being *ex parte*. *C* applied thereafter to set aside the *ex parte* decree against him, and on rehearing the suit, the Court restricted itself to the case of *C*. Ultimately a decree was passed against all the defendants. Within three years thereafter but after three years from the date of the original decree, the decree-holder applied for execution. *A* and *B* contended that as against them the application was barred by limitation. It was held by the High Court of Allahabad that when the decree was set aside at the instance of *C*, it must be deemed to have been set aside in its *entirety* (it being one and indivisible), that the subsequent decree passed was one against all the defendants, and that the application for execution being within three years of the date of that decree was not barred.⁵ The same view was expressed by the High Court of Madras also.⁶ A very similar case came before the Privy Council in *Ashfaq Hussain v. Gauri Sahai*.⁷ In that case *X* obtained a decree against *B, C* and *D* on the 25th August 1900. *D* subsequently applied to set aside the decree which had been passed *ex parte* against him. It was set aside against him but subsequently a decree was passed against him also on 16th November 1904. The decree was made absolute on 17th November 1905. The decree-holder applied on 21st December 1905 for execution of both the decrees. It was held by their Lordships of the Privy Council that the second decree must be taken to have supplemented and completed the first decree and it was from the date that it was made absolute that the statute began to run. It was

4. (1921) A I R 1921 Cal 699 (703) : 70 Ind Cas 6, *Sashikanta Acharya v. Sarat Chandra Rai Chaudhari*.
- (1924) A I R 1924 Cal 181 (182) : 50 Cal 743 : 74 Ind Cas 1017, *Hayatunnessa Chowdhurans v. Achia Khatun*.
- (1927) A I R 1927 Bom 191 (193) : 51 Bom 125 : 100 Ind Cas 956, *Chhagan Lal Sakar Lal v. Jayaram Deoraj*. (Where there was a preliminary decree passed and there was an order making the decree for sale absolute, but there was no formal final decree drawn up : Held, that an omission to draw up a formal decree may be condoned where the terms of the decree sought to be executed are otherwise ascertained or clearly ascertainable and Section 99, O. P. Code, would cover such an error or irregularity if it does not affect the merits of the case or jurisdiction of the Court.)
- (1897) 19 All 520 (520, 521) : 1697 All W N 137, *Mahabir Prasad v. Sital Singh*.
- (1896) 1896 All W N 100 (100), *Mulchand v. Muktapal Singh*.
- (1912) 15 Ind Cas 732 (733) (Mad), *Yamani Chinna Seshayya v. Varanasi Pepaya*.
- (1912) 17 Ind Cas 750 (759) (Mad), *Venkata Perumal Raju v. Audileswarai Reddi*.
- (1913) 18 Ind Cas 10 (10) (Mad), *Ramasami Iyengar v. Chinna Thambi*.
- (1916) 18 Bom L R 41 (43) (Jour).
5. (1910) 5 Ind Cas 284 (285) (All), *Samodh Dhar Dube v. Dhuladhar Dube*.
6. (1919) 37 Mad L Jour 2 (2, 3, 4) (N I C) (Critical Note on 46 Cal 25 : A I R 1919 Cal 253 : 50 Ind Cas 15, *Umesh Chandra v. Akur Chandra*.)
7. (1911) 9 Ind Cas 975 (977) : 33 Ind App 37 : 33 All 264 (I C)

then that the plaintiff was justified in applying for the joint execution of the decree to which he was entitled. In the under-mentioned case,⁸ *A* obtained a decree for money against *B*, *C* and *D*. On the application of *D* for setting aside the decree, the Court ordered that the suit as against *D* should be dismissed, but should be decreed *ex parte* against *A* and *B*. It was held by the High Court of Calcutta, distinguishing the Privy Council case referred to above, that the order so far as it purported to be against *A* and *B* was a nullity, that the only decree enforceable against them was the original decree and that time under this Article ran from that date.

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Notes 25-26

26. Clause 1 not applicable where decree is not immediately capable of execution.—Where a decree is immediately capable of execution, an application for the execution thereof is clearly governed by clause 1 of this Article. The clause will not, however, apply where the decree in respect of which the application for execution is made, is not, on the date of its passing, immediately capable of execution. In the case of such a decree, time cannot, as has been seen in Note 11 *ante*, run against the decree-holder until the decree becomes capable of execution.¹ It is a fundamental principle of law that, for the purpose of any particular application, time will run only from the moment at which the applicant first becomes entitled to make it.² Since “the date of the decree” can, as seen in Note 25 *ante*, mean only the date of the judgment, clause 1, which makes time run from the date of the decree, cannot be applied to applications for the execution of decrees which are not capable of execution on the date on which they are passed, but which subsequently become capable of execution. It has accordingly been held in numerous cases that such applications (where they do not also fall under any other clause of this Article), would be governed by the general Article 181.³ Thus, where a decree was for possession of immovable property,

8. (1919) A I R 1919 Cal 253 (254) . 46 Cal 25 : 50 Ind Cas 15, *Umesh Chandra Roy v. Alhura Chandra Sirdar*.

Note 26

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(1884) 8 Mad 137 (139), *Krishnan v. Nilakandan*.

(1906) 29 Mad 46 (47), *Ratnachalam Ayyar v. Venkatarama Ayyar*.

2. (1928) A I R 1928 Cal 646 (648) : 56 Cal 61 : 117 Ind Cas 543 (S B), *Hari Mohan Dalai v. Parameswar Shau*.

3.

Ground.

(1885) 8 All 56 (57) : 1885 All W N 327, *Thalur Das v. Shadial*.

(1924) A I R 1924 All 263 (264) : 46 All 78 : 79 Ind Cas 605, *Suraajman Chaudh v. Anjoure Shulal*.

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on default by the judgment-debtor in the payment of a certain annuity year by year, it was held that an application for the execution of the decree after default was one governed by Article 178 of the Act of 1877, corresponding to Article 181 of the present Act.^{3a} It has been held, however, in the undermentioned cases,⁴ that the words "date of the decree" in clause 1 mean the date of the effectiveness of the decree, and that clause 1 will apply even where the decree becomes capable of execution only on a future date. It is submitted that this view is not correct.

Whether a decree is, or is not, capable of immediate execution depends upon the construction of the decree and also upon other circumstances of the case.⁵ It is not necessary that the non-executability of the decree must be *inherent* in the decree itself in order to avoid the operation of clause 1. Where execution could not be successfully taken against the property specified in the decree by reason of causes for which the decree-holder is not responsible, it was held by the High Court of Madras that an application for execution against the property specified, after such property became

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- (1897) 1897 Pun Re No. 65 (F B), *Hanwanta v. Bhagirath*. (Overruling 1892 Pun Re No 126.)
- (1914) A I R 1914 Cal 36 (37) : 21 Ind Cas 615, *Mahamaya Prasad Singh v. Abdul Hamid*.
- (1920) A I R 1920 Upp Bur 21 (23) . 60 Ind Cas 23 : 3 Upp Bur Rul 261, *Yinke Supaya v. Maung Km.*
 [See also (1895) 1895 Bom P J 129, *Manchha Kasan v. Amtha Hira.*]
- 3a.(1894) 16 All 237 (239) : 1894 All W N 61, *Muhammad Islam v. Muhammad Ahsan.*
4. (1927) A I R 1927 Oudh 489 (489) : 105 Ind Cas 545, *Mt. Fatima Begam v. Ranjit Khan.*
- (1874) 1874 Bom P J 165, *Murhar v. Sadashiv*. (Case under the Act of 1871.)
5. In the following cases the decree was held capable of immediate execution :
- (1925) A I R 1925 Mad 1083 (1083, 1084) : 87 Ind Cas 557, *Chandukutty Nayar v. Narayana Nayar.*
- (1900) 2 Bom L R 199 (200), *Shadlingappa v. Durdundeppa.*
- (1895) 1895 All W N 100 (100), *Prasad v. Shree Sahai*. (A decree was
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- (1925) A I R 1925 Mad 1276 (1276) : 90 Ind Cas 769, *Muthu Alagappa*

In the following cases the decree was held not capable of execution :

- (1894) 1894 Bom P J 259, *Sakharam v. Bapuji*. (Declaratory decree not capable of execution.)
- (1930) A I R 1930 Lah 110 (111) : 120 Ind Cas 597, *Banu Mal v. Paras Ram*. (Do.)
- (1893) 16 All 179 (181) . 1894 All W N 17, *Ram Drai v. Indar Kuar*. (Do.)
- (1929) A I R 1929 Nag 34 (35) : 115 Ind Cas 161, *Mt. Dhannabai Johri v. Keshuchand Johri*.

capable of being proceeded against, was governed by Article 181.⁶ Mr. Justice Wallace observed as follows :

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"It had been held in several cases that the immediate non-executability of a decree must be inherent in the decree itself, that is, that the mere reading of the decree would show that it was unexecutable at once. But the decree in *Rameshwar Singh v. Homeshwar Singh*⁷ did not, on the face of it, imply any such non-executability since, for all that the Court passing the decree knew, the judgment-debtor might be already in possession of Janeshwar's property and therefore the decree would be enforceable as soon as passed. The general principle laid down by the Privy Council is, that in order to make a provision of the Limitation Act, namely, Article 182 apply, the decree sought to be enforced must have been in such a form as to render it capable 'in the circumstances' of being enforced. I would stress the words 'in the circumstances' as implying that the Court is to be guided by the circumstances of the case in deciding whether the decree could not have been enforced at once, that is, whether any right to execute it had, or had not, accrued. Part of the circumstances which their Lordships considered relevant in that case was whether or not the decree-holder was responsible for the delay which had taken place in giving effect to his title, that is, his right to execute."

27. Combined decree against person and property, when capable of execution. — Where a combined decree was passed under the old Code of Civil Procedure against the person and the property of the mortgagor, it was held that time would, even in respect of the former relief, run from the date of the decree under clause 1 of this Article.¹ Where a mortgage decree directed that the mortgaged property should be sold and that if the sale proceeds

(1911) 10 Ind Cas 552 (554) · 36 Mad 104, *Vydanatha Aiyar v Subramania Pattar* (Decree awarding certain sums of money and also certain other sums to be ascertained and taxed by the Court later on—Decree held to be capable of execution as a whole when the sums were so ascertained.)

(1929) 109 Ind Cas 829 (830) (Mad), *Annamalai Chettiar v Rajappier*. (Where a preliminary decree in a partition suit directed partition and possession of a share to the plaintiff and also awarded past mesne profits. Held, that limitation for an execution application for the mesne profits only commenced to run from the date of the final decree and not from the date of the preliminary decree.)

6. (1925) A I R 1925 Mad 931 (983) 68 Ind Cas 204, *Mangamma Nayakuralu v Ramdasappa Nayanamataru*.

7. (1921) A I R 1921 P C 31 (32) 48 Ind App 17 59 Ind Cas 636 (P C).

Note 27

1. (1926) A I R 1926 Mad 954 (955) 92 Ind Cas 846 : 50 Mad 5, *Srinamintha Odayar v. Thiyagarajawaram Odayar*. (Case under Section 49, Civil Procedure Code, but the principle is the same.)

[See also (1921) A I R 1921 Cal 456 (456) : 66 Ind Cas 753, *Baranash Koer v. Bhabadeb Chatterjee*.]

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proved insufficient, the balance should be realized from the mortgagor personally, it was held by their Lordships of the Privy Council that time, for an application for execution of the latter part of the decree, ran from the date of the decree, and not from the date when the sale proceeds proved insufficient.²

28. Decree partly executable at once and partly not.—Where a decree is partly preliminary and partly final, and the latter part is separately executable at once, time for an application for execution of that part will run from the date of the decree.¹ In the undermentioned case,² a preliminary decree was passed for partition of certain properties, and along with it a decree was also passed for costs to be paid by the judgment-debtor. It was held that the order for costs was separately executable and that an application for execution must be filed within three years of the date of the decree. It was also held, however, that the decree-holder might apply for the incorporation of the previous order in the final decree, although the execution of such order independently was barred by limitation.

Where an interlocutory judgment was passed against one of two defendants, and a final judgment was passed later on against both, it was held that time began to run, so far as the former was concerned, from the date of the interlocutory judgment as if there were two decrees, one bearing the former date.³

29. Decree for injunction.—It has been held by the Chief Court of Lower Burma that an application to enforce a decree for injunction, whether mandatory or prohibitory, would be governed by the provisions of this Article.¹

A contrary view, viz., that this Article will not apply, has been taken by all the other Courts.²

According to the High Court of Allahabad,³ the disobedience to an injunction is a contempt of Court and can be punished at any time. It would seem, according to this Court, that there is no limitation applicable to such cases.

2. (1917) A I R 1917 P O 85 (85) : 45 Ind Cas 436 (437) (P C), *Khulna Loan Co. Ltd. v. Jnanendra Nath Bose*.

Note 28

1. (1929) A I R 1929 Cal 393 (393, 394) : 118 Ind Cas 852, *Satish Chandra Chakravarti v. Sarai Kamini Devi*.
2. (1938) A I R 1938 Pat 188 (189) : 175 Ind Cas 45, *Salahuddin Ahmad v. Imamuddin*.
3. (1936) A I R 1936 Rang 318 (314) : 164 Ind Cas 718, *Hock Sein v. Kyaukse Municipalty*.

Note 29

1. (1912) 15 Ind Cas 945 (946) : 6 Low Bur Rul 85, *Haji Ahmed Moola Darwood v. Paker Mull*.
2. See the cases cited in Foot-Notes (3) to (6).
3. (1901) 23 All 465 (466) : 1901 All W N 142, *Ram Saran v. Chata Singh*.
 (1905) 28 All 300 (302) : 1906 All W N 10 : 3 All L Jour 636, *Bhagwan Das v. Sukh Dev*.

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Notes 30-31

that when it was deposited, it will be included in the costs. It was held that the date of the decree was the starting point of limitation for an application for execution of the decree.³

In a suit *for mesne profits* or for an account, where the amount decreed is in excess of the amount claimed, Section 11 of the Court-fees Act expressly provides that the decree *shall not be executed* until the additional court-fee on the excess amount shall have been paid to the proper officer. Such a decree would clearly be incapable of execution until the additional fee is paid, and it has been held accordingly in the undermentioned cases⁴ that time will run only when the court-fee is actually paid. On the principles discussed in Note 26, *ante*, the Article applicable to an application for the execution of such decrees would be Article 181. A contrary view, namely that the decree cannot be said to be not capable of execution in such cases, has been held by the cases⁵ cited below.

31. Decree becoming inexecutable by reason of subsequent events. — *A* obtained a decree for money against *B* on 20th April 1922. On 3rd May 1924, *B* put in a petition stating that he had discharged the debt and praying that satisfaction of the decree might be entered up. An order was made to that effect by the Court on 23rd December 1924. *A* appealed from the said order and the Appellate Court, on the 26th February 1926, reversed it and held that the decree was unsatisfied. The decree-holder *A* applied on 9th June 1928 for execution. It was held that the application was not barred.¹ As has been seen in Note 11 to Section 9 *ante*, where a cause of action is, through Court or otherwise, satisfied or discharged, limitation stops running in regard to such cause of action on the fundamental principle that limitation always implies an existing cause of action, and in such cases where the satisfaction or the discharge of the cause of action is nullified by subsequent events, the plaintiff or the applicant, as the case may be, is entitled to a *fresh* cause of action, consequent on such nullification, and a fresh period of limitation in respect of such cause of action. The decision referred to above seems to have proceeded only on this principle. The Article applicable to the application based on the fresh right to

3. (1927) A I R 1927 All 335 (336) : 100 Ind Cas 476, *Buddhu Khan v. A. Boner*.

4. (1904) 1 All L Jour 350 (352), *Subhagga Singh v. Shri Nath Singh*.
 (See also (1920) A I R 1920 Mad 970 (972) : 59 Ind Cas 385, *Natharsa Rowther v. Muhammad Rowther*.

5 (1938) A I R 1938 Lah 826 (827) : 178 Ind Cas 202, *Uttam Chand Kapur & Sons v. Sayad Hamid Ali*.

(1930) A I R 1930 Nag 241 (241) 122 Ind Cas 438, *Mt. Bhurabi v. Rahmatbi*.

Note 31

1. (1934) 67 Mad L Jour 24 (N R O), (Affirming on appeal A I R 1933 Mad 785 (787).)

apply, would be Article 181, as none of the clauses of the third column of Article 182 would apply to such a case.

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32. Decree on condition to be performed by the decree-holder himself.—There is a conflict of opinion on the question whether a decree in favour of *A*, on payment by him to the judgment-debtor of a certain sum of money, is a decree which is capable of immediate execution, and in respect of which time for an application for execution will run from the date thereof. According to the High Courts of Allahabad¹ and Bombay² and the Chief Court of Oudh,³ such a decree is not capable of immediate execution, even though the payment had to be made by the decree-holder himself. On the other hand, it has been held by the High Court of Madras⁴ and the Judicial Commissioner's Court of Nagpur⁵ that such a decree is capable of immediate execution, and that time will run under Article 182 clause 1 from the date of the decree. In *Rungiah Gounden & Co. v. Nanjappa Row*,⁶ their Lordships of the Madras High Court observed: "It may well be doubted whether a decree in a pre-emption suit is not one enforceable at its date, inasmuch as it is perfectly open to the decree-holder to pay the amount into Court on the date of the decree and apply for execution." In *Ramappayya v. Charda Bhatta*,⁷ where the decree directed the judgment-debtor to surrender the garden claimed in the suit on the plaintiff paying him a certain sum of money for improvements, their Lordships of the Madras High Court observed that the decree-holder might have paid this at any time after the decree, and his application for delivery more than three years from the date of the decree was therefore time-barred.

Note 32

1. (1902) 24 All 300 (303) 1902 All W N 60, *Chhedri v. Lulu* (Article 181 applied)
- (1919) A I R 1919 All 224 (225) 51 Ind Cas 576, *Mt. Rukmina Kuar v. Sheo Dat Das* (Do)
- (1931) A I R 1931 All 326 (327) 131 Ind Cas 559, *Sirs Narain Tewari v. Brij Narain Rai*
[But see (1892) 14 All 350 (354) 1892 All W N 40, *Bandhu Bhagat v. Shah Muhammad Taqi*]
2. (1938) A I R 1938 Bom 367 (369) 177 Ind Cas 499 I L R (1938) Bom 649, *Gopal Sattu v. Dnyanu Maruti*
[But see (1899) 23 Bom 592 (594) 1 Bom L R 31, *Maruti v. Krishna*]
- 3 (1919) A I R 1919 Oudh 892 (392) 22 Oudh Cas 82 52 Ind Cas 156, *Chandika Prasad Singh v. Kalu*
(1928) A I R 1928 Oudh 286 (287) 110 Ind Cas 77 . 3 Luck 578, *Irshad Ahmad v. Mt. Saidunnisa*.
(1911) 10 Ind Cas 187 (188) . 14 Oudh Cas 100, *Ajudhia Singh v. Dnyupal Singh*.
4. (1903) 26 Mad 780 (786) 17 Mad L Jour 412, *Rungiah Gounden & Co v. Nanjappa Row*.
(1910) 7 Ind Cas 568 (568) (Mad), *Ramappayya v. Charda Bhatta*.
5. (1931) A I R 1931 Nag 54 (56) 26 Nag L R 533 130 Ind Cas 148, *Dada v. Ganpatrao*
6. (1902) 26 Mad 780 (786) : 13 Mad L Jour 412.
7. (1910) 7 Ind Cas 568 (568) (Mad).

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that when it was deposited, it will be included in the costs. It was held that the date of the decree was the starting point of limitation for an application for execution of the decree.³

In a suit *for mesne profits* or for an account, where the amount decreed is in excess of the amount claimed, Section 11 of the Court-fees Act expressly provides that the decree shall not be executed until the additional court-fee on the excess amount shall have been paid to the proper officer. Such a decree would clearly be incapable of execution until the additional fee is paid, and it has been held accordingly in the undermentioned cases⁴ that time will run only when the court-fee is actually paid. On the principles discussed in Note 26, *ante*, the Article applicable to an application for the execution of such decrees would be Article 181. A contrary view, namely that the decree cannot be said to be not capable of execution in such cases, has been held by the cases⁵ cited below.

31. Decree becoming inexecutable by reason of subsequent events. — *A* obtained a decree for money against *B* on 20th April 1922. On 3rd May 1924, *B* put in a petition stating that he had discharged the debt and praying that satisfaction of the decree might be entered up. An order was made to that effect by the Court on 23rd December 1924. *A* appealed from the said order and the Appellate Court, on the 26th February 1926, reversed it and held that the decree was unsatisfied. The decree-holder *A* applied on 9th June 1928 for execution. It was held that the application was not barred.¹ As has been seen in Note 11 to Section 9 *ante*, where a cause of action is, through Court or otherwise, satisfied or discharged, limitation stops running in regard to such cause of action on the fundamental principle that limitation always implies an existing cause of action, and in such cases where the satisfaction or the discharge of the cause of action is nullified by subsequent events, the plaintiff or the applicant, as the case may be, is entitled to a *fresh* cause of action, consequent on such nullification, and a fresh period of limitation in respect of such cause of action. The decision referred to above seems to have proceeded only on this principle. The Article applicable to the application based on the fresh right to

3. (1927) A I R 1927 All 335 (336) : 100 Ind Cas 476, *Buddhu Khan v. A. Boner*.

4 (1904) 1 All L Jour 350 (352), *Subhagga Singh v. Shiva Nath Singh*.

[See also (1920) A I R 1920 Mad 970 (972) : 59 Ind Cas 885, *Natharsa Routh v. Muhammad Rowther*.

(1938) A I R 1938 All 539 (540). I L R 1938 All 848 : 177 Ind Cas 875, *Babu Ram v. Gopal Sahai*. (Suit for account — Article applicable seems to have been assumed to be Art. 182 — It is submitted this is not correct.)]

5 (1938) A I R 1938 Lah 326 (327) : 178 Ind Cas 202, *Uttam Chand Kapur & Sons v. Sayad Hamid Ali*.

(1930) A I R 1930 Nag 241 (241). 122 Ind Cas 488, *Mt. Bhurib v. Rahmatbi*.

Note 31

1. (1934) 67 Mad L Jour 24 (N R C), (Affirming on appeal A I R 1933 Mad 785 (787).)

apply, would be Article 181, as none of the clauses of the third column of Article 182 would apply to such a case.

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(Clause 1)
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32. Decree on condition to be performed by the decree-holder himself.—There is a conflict of opinion on the question whether a decree in favour of *A*, on payment by him to the judgment-debtor of a certain sum of money, is a decree which is capable of immediate execution, and in respect of which time for an application for execution will run from the date thereof. According to the High Courts of Allahabad¹ and Bombay² and the Chief Court of Oudh,³ such a decree is not capable of immediate execution, even though the payment had to be made by the decree-holder himself. On the other hand, it has been held by the High Court of Madras⁴ and the Judicial Commissioner's Court of Nagpur⁵ that such a decree is capable of immediate execution, and that time will run under Article 182 clause 1 from the date of the decree. In *Rungiah Gounden & Co. v. Nanjappa Row*,⁶ their Lordships of the Madras High Court observed: "It may well be doubted whether a decree in a pre-emption suit is not one enforceable at its date, inasmuch as it is perfectly open to the decree-holder to pay the amount into Court on the date of the decree and apply for execution." In *Ramappayya v. Charda Bhatta*,⁷ where the decree directed the judgment-debtor to surrender the garden claimed in the suit on the plaintiff paying him a certain sum of money for improvements, their Lordships of the Madras High Court observed that the decree-holder might have paid this at any time after the decree, and his application for delivery more than three years from the date of the decree was therefore time-barred.

Note 32

1. (1902) 24 All 300 (302) 1902 All W N 60, *Chhed: v. Lahu*. (Article 181 applied)
- (1919) A I R 1919 All 224 (225) 51 Ind Cas 576, *Mt. Rukmina Kuar v. Sheo Dat Rai* (Do)
- (1931) A I R 1931 All 326 (327) 131 Ind Cas 559, *Siri Narain Tewari v. Brij Narain Rai*
[But see (1892) 14 All 350 (354) 1892 All W N 40, *Bandhu Bhagat v. Shah Muhammad Taqi*]
2. (1938) A I R 1938 Bom 367 (369) 177 Ind Cas 499 I L R (1938) Bom 649, *Gopal Sattu v. Dnyanu Maruti*
[But see (1890) 23 Bom 592 (594) : 1 Bom L R 31, *Maruti v. Krishna*]
3. (1919) A I R 1919 Oudh 392 (392) : 22 Oudh Cas 82 : 52 Ind Cas 156, *Chandika Prasad Singh v. Kalu*
(1928) A I R 1928 Oudh 286 (287) : 110 Ind Cas 77 : 3 Luck 578, *Irshad Ahmad v. Mt. Saidunnisa*.
(1911) 10 Ind Cas 187 (189) : 14 Oudh Cas 100, *Ajudhia Singh v. Drigpal Singh*.
4. (1903) 26 Mad 780 (786) 13 Mad L Jour 412, *Rungiah Gounden & Co v. Nanjappa Row*.
(1910) 7 Ind Cas 563 (568) (Mad), *Ramappaya v. Charda Bhatta*.
5. (1931) A I R 1931 Nag 54 (56) : 26 Nag L R 833 : 130 Ind Cas 148, *Dada v. Ganpatrao*.
6. (1902) 26 Mad 780 (786) : 13 Mad L Jour 412.
7. (1910) 7 Ind Cas 563 (568) (Mad).

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The High Courts of Allahabad and Bombay have held in the undermentioned cases,⁸ that though a decree in favour of the plaintiff on condition of his paying a sum of money to the defendant is not a decree capable of execution at its date and therefore Article 182 is inapplicable, time will, nevertheless, run under Article 181 from the date of the decree itself, as there is nothing preventing the plaintiff in such cases from paying the amount at once and applying for execution.

CLAUSE 2.

33. Appeal. — This clause provides for a fresh starting point of limitation for execution in cases where there has been an appeal. The expression "appeal" in this clause will include civil revision petitions also.¹ In *Nagendra Nath Dey v. Suresh Chandra Dey*,² their Lordships of the Privy Council observed as follows: "There is no definition of appeal in the Civil Procedure Code, but their Lordships have no doubt that any application by a party to an Appellate Court, asking it to set aside or revise a decision of a subordinate Court is an appeal within the ordinary acceptation of the term. . . ." See also *Raja Rajeshwara Setupati Avergal v. Kamid Rowthen*,³ where their Lordships observed as follows: "From this judgment an appeal in the form appropriate to such a case from the Munsif's Court, i. e., civil revision petition, was preferred to the High Court of Madras."

It has been held that "appeal" in this clause does not necessarily mean a *bona fide* appeal.⁴

An application for leave to appeal to the Privy Council is not an appeal.^{4a}

8. (1931) A I R 1931 All 926 (327) : 181 Ind Cas 559, *Siva Narain Tewari v. Brij Narain Rai*.

(1938) A I R 1938 Bom 367 (369) : 177 Ind Cas 499 : I L R (1938) Bom 649, *Gopal Sattu v. Dnyanu Maruti*

Note 33

1. (1937) A I R 1937 Mad 385 (390) : 168 Ind Cas 561 : I L R (1937) Mad 616 (F B), *Chidambara Nadar v. Rama Nadar*. (Overruling 36 Mad 185.)

(1918) A I R 1918 Cal 866 (868) : 44 Ind Cas 141, *Gurupada Halder v. Tarit Bhusan Roy Chowdhury*.

[See (1909) 4 Ind Cas 629 (631) (Lah), *Mastan Shah v. Pahiwan Shah* (Where a petition for revision has been rejected by an appellate court without examining the respondent and similarly

[But see (1918) 20 Ind Cas 563 (564) (Lah), *Fusa v. Surjan*]

2 (1932) A I R 1932 P C 165 (167) : 137 Ind Cas 529 : 59 Ind App 283 : 60 Cal 1 (P C).

3 (1926) A I R 1926 P C 22 (24) : 53 Ind App 74 : 49 Mad 335 : 94 Ind Cas 522 (P C).

4. (1924) A I R 1924 Cal 349 (350) : 74 Ind Cas 679, *Basanta Kumar Roy v. Manguri Das*.

4a. (1900) 24 Mad 1 (12) : 2 Bom L R 771 : 27 Ind App 197 : 10 Mad L Jour 221 : 4 Cal W N 725 : 7 Sar 678 (P C), *Venkata Subbamma v. Venkata-rama Rao*.

See also the undermentioned case ⁵

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34. Appeal, whether should be against the decree or order sought to be executed. — The appeal referred to in clause 2 need not necessarily be against the decree or order sought to be executed. The words of the clause would cover any appeal which is *capable of affecting* the decree or order sought to be executed.¹ In *Nagendra Nath Dey v. Suresh Chandra Dey*,² their Lordships of the Privy Council observed as follows: "It is at least an intelligible rule that so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage." Hence, where, pending an appeal from a preliminary decree, a final decree is passed, and *thereafter*, a decree is passed in the appeal, limitation for the execution of the final decree will only run from the date of the decree passed in the appeal and not from the date of the final decree.³ So also, where an application for review of a decree is allowed and an appeal is preferred against the order allowing the review application, limitation for the execution of the decree will run from the date of the final order of the Appellate Court in such appeal.⁴

A decree was passed in review, altering the decree originally passed in the suit. There was an appeal against the decree on review and such decree was set aside in the appeal with the result that the decree originally passed in the case was restored. It was held that limitation for the execution of such decree ran from the date of the appellate decision setting aside the decree passed on review.⁵

Suppose an application to set aside an *ex parte* decree is dismissed and an appeal is preferred against the order dismissing such application, which appeal is also dismissed. It will be clear from the above discussion that limitation for the execution of the *ex parte* decree will run, in such a case, not from the date of the

5 (1909)

Note 34

1. (1937) A I R 1937 Mad 421 (422) : 171 Ind Cas 980, *Koyalutti v. Veeran-kutti*.
2. (1932) A I R 1932 P C 165 (167) : 59 Ind App 283 : 60 Cal 1 : 137 Ind Cas 529 (P C).
3. (1937) A I R 1937 Mad 421 (423) : 171 Ind Cas 980, *Koyalutti v. Veeran-kutti*. (Disenting from A I R 1933 Mad 815.)
(1928) A I R 1928 Pat 581 (581) : 110 Ind Cas 483, *Somar Singh v. Deonandan Prasad Singh*.
- (1927) A I R 1927 Pat 215 (218) : 6 Pat 780 : 102 Ind Cas 811, *Somar Singh v. Deonandan Prasad Singh*.
4. (1933) A I R 1933 Bom 255 (257) : 57 Bom 388 : 147 Ind Cas 1227, *Nayappa Bandappa v. Gurushantappa Shankrappa*.
(1936) A I R 1936 Bom 162 (163) : 162 Ind Cas 223, *Narayan Ganpat v. Radhabai Krishnaji*.
5. (1882) 4 All 274 (276) : 1882 All W N 25 : 6 Ind Jur 597, *Narsingh Senkat v. Madho Das*.

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decree but from the date of the appellate order dismissing the appeal from the order refusing the application to set aside the *ex parte* decree,⁶ for if the appeal from such order succeeds, the *ex parte* decree itself would cease to exist.

But it has been held in some decisions that in such cases, limitation for the execution of the *ex parte* decree, runs from the date of the *ex parte* decree and not from the date of the appellate order.⁷ These decisions proceed on the view that an appeal within this clause is an appeal against the decree or order sought to be executed. It is submitted that this view is not correct.

An appeal against an order passed in proceedings for the execution of a decree cannot affect the *decree* in any way and such an appeal, therefore, cannot give a fresh starting point of limitation for execution in respect of the decree.⁸

35. Appeal against portion of decree, if saves limitation for execution of whole decree.—In *Nagendra Nath v. Suresh Chandra Dey*,¹ A and B were co-mortgagees under a mortgage. A brought a suit on the mortgage claiming that B had assigned his interest in the mortgage to him. This claim was overruled and a decree for sale was passed in which it was provided that B was entitled to receive a certain amount from the sale proceeds of the mortgaged property. A appealed against B in respect of this provision in the decree. The judgment-debtor was not joined as a party to this appeal. The appeal was dismissed. Then B applied for execution of the mortgage decree. It was contended that limitation for the application ran not from the date of the dismissal of the appeal but from the date of the original decree. The contention was based, *inter alia*, on the following two grounds: 1. that an appeal in order to save limitation under clause 2 of the Article must be one to which the persons affected

6. (1939) A I R 1939 Mad 157 (158), *Sri Ramchandra Rao v. Venkateswara Rao*.

(1881) 8 Cal 248 (250); 10 Cal L R 143; 6 Ind Jur 357, *Lutful Huq v. Sumbhu Din Pattuck*.

(1937) A I R 1937 Pat 337 (340); 16 Pat 306; 169 Ind Cas 581, *Firm D. B. & Co. v. D. B. & Co.*

Sukhnandan Singh v.

v. Anrudh Singh.

(1891) 16 Bom 123 (124), *Jwaji v. Ramchandra*.

(1931) A I R 1931 Cal 332 (333); 131 Ind Cas 263, *Profulla Kumar Basu v. Sorajbala*.

(1927) A I R 1927 Cal 904 (905); 54 Cal 1052; 104 Ind Cas 466, *Fakir*

Raj v. Gurditta

1 Cas 728, *Jabar-*

khan v. Rahim Khan.

(1917) A I R 1917 Pat 157 (158); 44 Ind Cas 575; 3 Pat L Jour 119, *Rambhraj v. Nauratanlal*.

8. (1883) 5 All 236 (237). 1883 All W N 5, *Hulas v. Masku*.

(1926) A I R 1926 Pat 129 (130); 89 Ind Cas 886, *Ibrahim Hussain Khan v. Sheopratap Naram*.

Note 35

1. (1932) A I R 1932 P C 165 (167); 137 Ind Cas 529; 59 Ind App 283; 60 Cal 1 (P C).

i. e., in the present case the judgment-debtors, were *parties*; and 2. that it must also be one in which the *whole decree* was imperilled. Their Lordships of the Privy Council in repelling the above contentions observed that the questions raised had been the subject of much difference of opinion in India. After referring to certain decisions to illustrate their statement, their Lordships proceeded as follows :

"Their Lordships think that nothing would be gained by discussing these varying authorities in detail. They think that the question must be decided upon the plain words of the Article: 'where there has been an appeal,' time is to run from the date of the decree of the Appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage. Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously inclined, there is nothing to prevent his paying what he owes into Court. But whether there be or be not a theoretical justification for the provision in question, their Lordships think that the words of the Article are plain, and that there having been in the present case an appeal from the mortgage decree of the 24th June 1920, time only ran against the appellants (the applicants for execution) from 24th August 1922, the date of the Appellate Court's decree."

It is clear from the above that although an appeal may have been preferred only against a portion of the decree, limitation will be saved under clause 2 in respect of the *whole decree*.² Similarly,

2. (1895) 17 All 103 (105) : 1895 All W N 20, *Dad: un-nissa v. Shams-uddin*.

(1877) 1 All 503 (509), *Imam Ali v. Dasaundi Ram*.

(1893) 18 Bom 203 (205) : 1893 Bom P J 79, *Saihalchand Rikhardas v. Velchand Gujar*.

(1927) A I R 1927 Cal 89 (90) : 53 Cal 901 : 97 Ind Cas 638, *Abdul Alim v. Abdul Hafiz*.

(1934) A I R 1934 Lah 318 (318) : 15 Lah 267 : 147 Ind Cas 639, *Ghulam Hussain Shah v. Riddha Rani*.

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(Clause 2)
Note 35**

for the clause to apply it is not necessary that the person by or against whom execution is sought should have been a party to the appeal.³ Thus, where a decree is passed against several defendants and one of them alone appeals against the decree without impleading the others, limitation for execution of the decree against the non-appealing defendants also will run from the date of the appellate decree.⁴ So also, where a suit by A against B and C is decreed against B but dismissed against C, and A appeals against the dismissal of his suit against C without impleading B as a party to the appeal, limitation for execution of the decree against B will run only from the date of the decree in the appeal against C.⁵

- (1925) A I R 1925 Mad 557 (558, 559) : 156 Ind Cas 1029, *Kanniammal v. Palakrishna Tharayy*. (In all cases, what Art. 182 (2), Limitation Act, refers to is a decree, viz. one decree, and it is not permissible for Courts in execution to look into the matter and say that, as there are several reliefs which are severable, what is nominally one decree, consists of several decrees.)
- (1902) 25 Mad 91 (92) (F B), *Erinamachariar v. Mangammal*.
(1899) 23 Mad 60 (67) : 9 Mad L Jour 284, *Vararaghava Iyengar v. Ponnammal*.
(1925) A I R 1925 Pat 40 (43) : 79 Ind Cas 794 : 3 Pat 327, *Somar Singh v. Mt. Premdei Kuer*.
3. (1886) 8 All 573 (575) : 1556 All W N 237, *Nur-ul-Hasan v. Muhammad Hasan*.
(1896) 22 Bom 500 (505) : 1896 Bom P J 679, *Abdul Rahiman v. Maidin Saika*. (Appeal means any appeal by any party and not an appeal by which the whole decree is imperilled.)
(1925) A I R 1925 Pat 585 (587) : 91 Ind Cas 308 : 4 Pat 844, *Haji Lal Kumar v. Ganu Mahto*.
4. (1906) 3 All L Jour 231 (232) : 1906 All W N 155, *Dhiman Mal v. Panna Lal*.
(1883) 6 All 14 (15) : 1883 All W N 179, *Basant Lal v. Najmunnissa Bibi*.
(1881) 4 All 137 (140) : 1881 All W N 152, *Kishen Sahai v. Collector of Allahabad*.
(1920) A I R 1920 Bom 331 (331) : 44 Bom 34 : 53 Ind Cas 187, *Chollappa v. Ramachandra*. (Decree against principal debtor and surety—Principal debtor alone appealing—Surety not made party—Still, time saved even against surety.)
(1909) 1 Ind Cas 459 (460) : 33 Bom 39, *Shitram v. Sakharam*.
(1898) 25 Cal 594 (602) : 2 Cal W N 556 (F B), *Gopal Chunder Manna v. Gassain Das Kalay*.
(1880) 6 Cal 194 (196) : 6 Cal L R 573, *Mullick Ahmed Zumma v. Mahomed Syed*.
(1878) 3 Cal L R 430 (431), *Gungamoyee Dasse v. Shib Sunkur Bhutla-charjee*.
(1908) 1908 Pun L R No. 8 : 1907 Pun Re No. 32 : 1906 Pun W R 155, *Anwar Ali v. Anayat Ali*.
(1898) 8 Mad L Jour 228 (230), *Venkata Chinnaya Rau v. Krishna Charayalu*.
(1899) 23 Mad 60 (67) : 9 Mad L Jour 284, *Vararaghava Ayyangar v. Ponnammal*.
(1902) 5 Oudh Cas 217 (219, 220), *Someshur Dat v. Dunia Prasad*.
5. (1924) A I R 1924 Pat 160 (161) : 2 Pat 712 : 77 Ind Cas 357, *Panchu Bania v. Anand Thakur*.
(1920) A I R 1920 Cal 840 (841) : 47 Cal 618 : 60 Ind Cas 915, *Satish Chandra Chaudhuri v. Girish Chandra Chakravarty*.
(1884) 1884 All W N 138 (138), *Ram Lal v. Jagannath*.
(1896) 22 Bom 500 (505, 508) : 1896 Bom P J 679, *Abdul Rahiman v. Maidin Saika*.

Some decisions proceed on the view that where all the parties to the decree have not been parties to the appeal, the applicability of the clause as regards persons who have not been parties to the appeal depends on whether the appeal imperils the whole decree.⁶ The clear pronouncement of the Privy Council above referred to shows that this view is not correct. As observed by the Madras High Court in *Ari Chetty v. Theerthamalai Chetty*,⁷ "the question of limitation ought not to be made to depend upon the other question (which is almost always a very difficult and doubtful one) whether the appeal by one of the defendants or as regards a part of the decree of the first Court imperils the decree passed against the other defendants, or the other portion of the decree"⁸ It may also be noted that under Order 41 Rule 33 of the Civil Procedure Code (a provision which was newly introduced in the Code of 1908) the Appellate Court has the power to pass any decree or order which the justice of the case may require, notwithstanding that the appeal is as to part only of the decree, and that this power may be exercised in favour of parties who have not themselves filed any appeal or objection against the decree.

36. Appeal by or against one person, whether saves limitation for execution by or against another. — See Note 35 above.

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6. (1914) A I R 1914 Cal 583 (584, 585) : 22 Ind Cas 685, *Mrs. Christiana Ben-shawn v. Benarsi Prosad Chowdhury*. (Appeal not imperilling whole decree—Time runs only from the lower Court's decree.)
 (1867) 14 Cal 26 (33), *Raghunath Pershad v. Abdul Hye*. (Do.)
 (1904) 1 All L Jour 409 (410, 411), *Ganga Kuar v. Keshar Kuar*. (Do.)
 (1881) 4 All 36 (37) : 1881 All W N 128 : 6 Ind Jur 381, *Sangram Singh v. Bujharat Singh*. (Do.)
 (1889) 13 All 1 (12, 13, 16) 1890 All W N 207 (F B), *Mashiat-un-Nissa v. Rani*. (Do.)
 (1930) A I R 1930 All 636 (637) : 128 Ind Cas 899, *Jadu Nandan Ram v. Parshottam Ginning Co. Ltd.* (Do.)
 (1878) 2 Cal L R 471 (478), *Hur Prosad Roy v. Enayat Hossain*. (Do.)
 (1889) 16 Cal 593 (602, 603), *Nundun Lall v. Rai Joykishen*. (Appeal impe-
 rilling whole decree—Time runs from appellate decree.)
 (1926) A I R 1926 All 145 (146) : 48 All 6 : 89 Ind Cas 286, *Kashi Prasad v. Mathura Prasad*. (Do.)
 (1917) A I R 1917 Pat 177 (178) : 37 Ind Cas 583, *Jagat Mohan Das v. Mahmud Ibrahim Hussain*. (Do.)
 (1916) A I R 1916 Cal 783 (786) : 31 Ind Cas 426, *Loke Nath Singh v. Gaju Singh*. (Do.)
 (1903) 5 Bom L R 735 (737), *Ramchandra v. Anataji*. (Do.)
 (1880) 6 Cal 194 (196) : 6 Cal L R 573, *Mullick Ahmed Zamma v. Mahomed Syed*. (Do.)
 (1874) 21 Suth W R 243 (244), *Dhoobunessuree Debia v. Chunder Moones Debia*. (Do.)
7. (1917) A I R 1917 Mad 691 (692) : 34 Ind Cas 791.
8. See also (1899) 23 Mad CO (67, 68, 69) : 9 Mad L Jour 284, *Viraraghava Ayyangar v. Ponnammal*. (The question whether a decree or a por-
 tion thereof was or was not imperilled by an appeal need not be taken
 into consideration.)

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(Clause 2)
Notes 37-40

37. Irregular or incompetent appeal.—In *Nagendra Nath Dey v. Suresh Chandra Dey*,¹ their Lordships of the Privy Council observed as follows: "There is no definition of appeal in the Civil Procedure Code, but their Lordships have no doubt that any application by a party to an Appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent." Hence, an appeal, though incompetent, will save limitation under clause 2.²

38. Appeal should have been admitted.—The words "where there has been an appeal" contemplate cases where the appeal has been *admitted*. Where the appeal has been rejected before admission, this clause will not apply.¹

39. Appeal from amended decree.—Where a decree is amended and an appeal is preferred against the amended decree, limitation for execution of the decree will run under this clause from the date of the appellate decree.¹

40. "Final decree or order."—These words are not used in contradistinction to any *preliminary* decree or order of the Appellate Court. The words only indicate the decree or order by which the Appellate Court *finally disposes of* the appeal. The words will clearly cover any decree or order of the Appellate Court in which the decree

Note 37

1. (1932) A I R 1932 P C 165 (167) : 137 Ind Cas 529 : 59 Ind App 283 : 60 Cal 1 (P C)

— (1932) A I R 1932 P C 165 (167) : 137 Ind Cas 529 : 59 Ind App 283 : 60 Cal 1 (P C) : 137 Ind Cas 1227, *Nagappa*

[Pat 430, *Kameswarhar*

- (1931) A I R 1931 Cal 546 (548) : 181 Ind Cas 80, *Sarat Chandra v. Joy Shankar Roy* (Appellate Court erroneously treating appeal as competent and passing decree—Time for execution runs from appellate decree.)

- (1921) A I R 1921 Sind 132 (134) : 79 Ind Cas 477 : 16 Sind L R 245, *Donald Graham & Co. v. Kewalram*.

Note 38

1

[But see (1889) 16 Cal 250 (252), *Akshoy Kumar Nundy v. Chunas Mohun Chathati*. (The words "where there has been an appeal" mean when a memorandum of appeal has been presented in Court)]

Note 39

1. (1929) A I R 1929 Cal 676 (677) : 122 Ind Cas 634 : 57 Cal 549, *Nagendra Nath v. Ambica Charan*.

or order of the lower Court is merged and which becomes the only executable decree or order in the case. Thus, where the decree is confirmed by the decree of the Appellate Court, the appellate decree will be a final decree within clause 2¹ But the expression is not confined to such decrees or orders but will also apply to other orders by which the appeal is finally disposed of.² In other words, the order of the Appellate Court need not be an *executable* order. But it must be a *judicial* order.

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(Clause 2)
Note 40**

In *Abdulla Ashgar Ali v Ganesh Das Vig*,³ their Lordships of the Privy Council observed as follows:

"Their Lordships think that when an order is judicially made by an Appellate Court which has the effect of finally disposing of an appeal, such an order gives a new starting point for the period of limitation prescribed by Article 182 clause 2 of the Act of 1908."

In that case, the Privy Council held that an order of an Appellate Court declaring an appeal to have abated and refusing to set aside the abatement, was a final order within the meaning of clause 2, although it is clear that such an order cannot supersede the decree of the lower Court and become the executable decree in the case. Similarly, in *Nagendra Nath v. Suresh Chandra*,⁴ the Privy Council held that although an appeal may be irregular or incompetent, clause 2 would apply, although it is clear that where an appeal is *incompetent*, the appellate decree cannot supersede the decree of the lower Court.

In *Abdul Majid v. Jawahir Lal*,⁵ the Privy Council held that an order dismissing an appeal to the Privy Council for *want of prosecution* was not a final order within clause 2 and proceeded further to hold that the decree of the lower Court had not been constructively turned into a decree of the Privy Council by such order so as to make the period of twelve years under Article 183 applicable to the case. In giving reasons for the latter view, the Privy Council observed that the order of dismissal did not deal *judicially* with the matter of the suit and could, in no sense, be regarded as an order adopting or confirming the decision appealed from. In *Sachindra Nath v. Maharaj Bahadur Singh*,⁶ the Privy Council

Note 40

1. (1894) 19 Bom 258 (260), *Nanchand v. Vithu*.
(1874) 28 Suth W R 57 (57), *Distoo Pershad Chuckerbutty v. Ishan Chunder Roy*
2. (1933) A I R 1933 P C 68 (70) : 142 Ind Cas 326 : 60 Ind App 83 : 60 Cal 662 (P C), *Abdulla Ashgar Ali v. Ganesh Das Vig*.
(1882) 9 Cal 100 (102), *Wazir Mahton v. Lulit Sing*.
3. (1933) A I R 1933 P C 68 (70) : 142 Ind Cas 326 : 60 Ind App 83 : 60 Cal 662 (P C).
4. (1932) A I R 1932 P C 165 (167) : 137 Ind Cas 529 : 60 Cal 1 : 50 Ind App 283 (P C).
5. (1914) A I R 1914 P C 66 (67) : 36 All 350 : 23 Ind Cas 649 (P C)
6. (1922) A I R 1922 P C 187 (190) : 49 Cal 203 : 49 Ind App 335 : 74 Ind Cas 660 (P C).

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(Clause 2)
Note 40

again held that an order dismissing an appeal to the Privy Council for want of prosecution was not a final order within clause 2. In doing so, it relied on the earlier decision in *Abdul Majid v. Jawahir*.¹ After stating that it had been held in that case that the period of three years under Article 182 ran, in such cases, from the date of the decree appealed against and not from the date of dismissal of the appeal for want of prosecution, the Privy Council referred with approval to the ground on which, according to it, the decision in the earlier case had been based. This ground was expressed to be contained in the passage in the earlier decision, wherein it had been held that inasmuch as the order of dismissal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from, the decree of the

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in *Sachindra Nath's case*,² that the Privy Council held in that case that an order of an Appellate Court, to come within the purview of clause 2, must be one dealing judicially with the matter of the suit and superseding the decree or order appealed from so as itself to become the executable decree or order in the case. But, as already pointed out, the later decision of the Privy Council in *Abdulla Ashgar Ali v. Ganesh Das Vig*³ clearly shows that this is not the view of the Privy Council. It will be seen from the decision in that case that the emphasis, in the view of the Privy Council, is not on the order of the Appellate Court dealing judicially with the matter of the suit but is on the order dealing judicially with the matters before the Appellate Court.

It will follow from the above discussion that the view expressed in some decisions⁷ that clause 2 only applies to cases where the decree or order of the Appellate Court confirms, modifies or reverses the decree or order of the lower Court and does not apply where an appeal is simply dismissed as being incompetent, is not correct.

On the principles discussed above, although the appeal is not decided on the merits and is simply dismissed as barred by limitation,⁸ or as being insufficiently stamped,⁹ clause 2 will apply

7. (1926) A I R 1926 All 440 (441) : 48 All 377 : 94 Ind Cas 961, *Nandlal v. Dharam Kirti*.
- (1923) A I R 1923 Cal 288 (289) : 68 Ind Cas 727, *Ram Ratan Chowdhury v. Upendra Chandra Das*.
8. (1931) A I R 1931 Pat 422 (423) : 134 Ind Cas 425 : 11 Pat 430, *Kameshwar Singh Bahadur v. Beni Madho Singh*.
- (1908) 30 All 290 (295) : 1908 All W N 109 : 5 All L Jour 534, *Asma Bibi v. Ahmad Husain*.
- (1834) 1834 All W N 46 (47), *Murlidhar Singh v. Tapeshri Rai*.
- (1889) 16 Cal 250 (252), *Akshoy Kumar Nundy v. Chunder Mohun Chathath*.
9. (1938) A I R 1938 Pat 79 (80) : 173 Ind Cas 615, *Krishna Kant Prasad v. Radhey Singh*.
- (1924) A I R 1924 Cal 349 (350) : 74 Ind Cas 679, *Basanta Kumar Roy v. Manjuri Dasi*.

and time will run only from the date of the appellate order. Similarly, where an appeal is dismissed on the representation of the appellant's counsel that he is unable to support the appeal, time for execution of the decree appealed against runs only from the dismissal of the appeal¹⁰

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(Clause 2)
Notes 40-41

Where, on appeal, the decree of the Court below is reversed and a fresh decree is directed to be prepared by the lower Court, the fresh decree prepared is really and only the decree of the Appellate Court and must be taken to bear the date on which the appellate judgment was pronounced.¹¹

41. Abatement of appeal. — Where an appeal from a decree abates and the Appellate Court passes an order declaring the appeal to have abated, such order is the final order of the Appellate Court within the meaning of clause 2 and, as such, will furnish a new starting point of limitation for execution of the decree.¹ In *Abdulla Ashgar Ali v. Ganesh Das Vig*,² their Lordships of the Privy Council observed, with reference to such an order of abatement, as follows :

"In the case now before their Lordships it is manifest that there was an order of the Appellate Court, and that it did deal judicially with the matters before it. The Judicial Commissioner (the Appellate Court in question) considered the judgment-debtor's contention (the judgment-debtor was the appellant in the Judicial Commissioner's Court) that his appeal had not

(1885) 7 All 687 (888) • 1885 All W N 260, *Rup Singh v. Mukhraj Singh*.

10. (1908) 30 All 385 (386) • 1908 All W N 161 : 5 All L Jour 580, *Fazlur Rahman v. Shah Muhammad Khan*.

11. (1928) A I R 1928 Oudh 229 (229) 109 Ind Cas 112, *Jai Lal v. Mahommed Haroon*

Note 41

1

(1905) 9 Cal W N 67 (67) (S N) : 1 Cal L Jour 17n, *Ramgati Dhur v. Nagendra Lal Chowdhry*.

application for execution brought within three years of the decree is not barred.]]

(But see (1921) A I R 1921 Pat 280 (283, 284), 58 Ind Cas 977, *Krishna Prasad Singh v. Wajir Narain Singh*. (The test appears to be whether there is a final decree or order of the appellate Court which can be executed and in the case of abatement there is not.))

(1897) 20 All 124 (126) : 1897 All W N 218, *Fazal Hussain v. Raj Bahadur*.

2. (1933) A I R 1933 P C 68 (70) : 142 Ind Cas 326 : 60 Ind App 93 : 60 Cal 662 (P C)

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; Note 41

abated and held that it had He rejected the application to set aside the abatement. Whether the order made was right or wrong is immaterial : there was no appeal against it, and it was, in the circumstances, clearly final. Their Lordships think that when an order is judicially made by an Appellate Court, which has the effect of finally disposing of an appeal, such an order gives a new starting point for the period of limitation prescribed by Article 182, clause 2 of the Act of 1908."

Pending an appeal by a judgment-debtor, the decree-holder dies. A wrong person is brought on the record as the legal representative of the deceased respondent and the Appellate Court, on the consent of such person, passes a decree setting aside or modifying the decree of the lower Court. The true legal representative of the deceased person then applies for the execution of the decree of the lower Court on the ground that the appellate decree does not bind him. In *Balaram Das Bhagat v. Raja Mukunda Deb*,³ it has been held by the High Court of Calcutta that in such a case the applicant for execution will be entitled to compute limitation from the date of the appellate decree, as the case comes within the plain grammatical meaning of clause 2. With reference to the contention that the clause applies only to cases where the application for execution is made in respect of the final decree of the Appellate Court and not to cases where the application relates to the decree of the lower Court, the High Court observed as follows :

"In our opinion, the second clause should not be interpreted to the detriment of the decree-holder in the case before us, because, as stated in *Nundun Lall v. Rai Jaykishen*,⁴ in a question of limitation, the Court will adhere as strictly as possible to the terms of the law. It has not been disputed, and it cannot be seriously disputed, that the phraseology of the clause in question, strictly construed, completely covers the case before us. It is further clear that the first clause of Article 182 applies to cases in which the application is made for execution of the decree of the Court of Appeal, because that decree, whether made in affirmance, or reversal or modification of the decree of the primary Court, is the only decree capable of execution, on the principle explained by this Court in *Ramcharan v. Lakhikant*⁵ and by the Judicial Committee in *Kistokinkur v. Burrodacaunt*.⁶ If this view is adopted, it is clear that Clause 2 ought not to be interpreted in the sense suggested by the appellants, because it is well settled, as was pointed out by Sir George Jessel, M R, in *Boatwright v. Boatwright*,⁷ that a Court would be slow to interpret a statute of limitation so as to affect

3. (1912) 16 Ind Cas 370 (372) (Cal).

4. (1889) 16 Cal 593 (602)

5. (1871) 16 Suth W R 1 (4, 5) 7 Beng L R 704 (F B)

6. (1872) 14 Moo Ind App 465 (463, 484) 10 Beng L R 101 : 17 Suth W R 292 : 2 Suther 564 : 3 Sar 62 (P C).

7. (1873) 43 L J Ch 12 (14) . L R 17 Eq 71 : 29 L T 603 . 22 W R (Eng) 147.

rights as to the enforcement of which there was no doubt. In the case before us, the liability of the appellant has been established by the decree, and we are not inclined to put a narrow construction upon clause 2 with a view to assist him to avoid payment of his just dues "

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Notes 41-42

See also the undermentioned case ⁸

42. Dismissal of appeal for default, whether gives a fresh start of limitation for execution. — There is a conflict of views among the decisions of the High Courts in India as to whether an order of an Appellate Court dismissing an appeal for default is a final order of an Appellate Court within the meaning of clause 2 so as to give a new starting point of limitation for execution of the decree or order appealed against. According to one view, such an order is not a *judicial* order and hence does not satisfy the requirements of clause 2.¹ The other view is that such an order *does* constitute a final order of the Appellate Court within the meaning of clause 2.² An examination of the decisions of the Privy Council indicates that the Privy Council favours the former view.

The question first came up for decision by the Privy Council in *Batuk Nath v. Munni Dei*.³ In that case, an appeal to the Privy Council had been dismissed for default of prosecution not by an order of the Privy Council but by the *office* of the Privy Council under the rules of the Privy Council. It was held that as there was no order of the *Appellate Court*, the dismissal did not furnish a fresh start of limitation.

8. (1924) A I R 1924 Cal 686 (687) 51 Cal 842 : 81 Ind Cas 569, *Krishna Lal Burman v. Satyabala Devi*. (In this case, on the consent of the person who was erroneously brought on the record as the legal representative of the deceased decree-holder respondent, the decree passed by the lower Court was set aside and the true legal representative applied for execution of the decree passed by the lower Court on the ground that

Note 42

1. (1932) A I R 1932 Pat 251 (252) : 189 Ind Cas 198 : 11 Pat 477, *Hriday Narayan Singh v. Maheshwari Prasad Singh*.
- (1936) A I R 1936 Lah 479 (480) : 167 Ind Cas 477, *Secretary of State v. Mt. Reshma*.
2. (1921) A I R 1921 Pat 6 (8) 59 Ind Cas 696, *Ragho Prasad Singh v. Jadunandan Prasad Singh*.
- (1935) A I R 1935 Lah 771 (774) : 16 Lah 504 : 161 Ind Cas 122, *Bank of Upper India Ltd. v. Sri Kishan Das*.
- (1935) A I R 1935 Pesh 129 (129, 130) : 158 Ind Cas 517, *Budhu Ram v. Mushtaq Shah Singh*.
- (1902) 5 Oudh Cas 143 (145), *Raghunath v. Farukhnd Ali*.
- (1930) A I R 1930 Pat 146 (148) : 123 Ind Cas 415, *Gurwal Raut v. Eyu Raut*.
- (1938) A I R 1938 Pat 401 (402) : 175 Ind Cas 558, *Ram Rantijaya Prasad Singh v. Kesho Prasad Singh*.
3. (1914) A I R 1914 P C 65 (66) : 36 All 284 : 41 Ind App 104 : 23 Ind Cas 644 (P C).

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Note 42

In the next case, viz. *Abdul Majid v. Jawahir Lal*,⁴ the question again was with regard to the dismissal of an appeal to the Privy Council and it was held by the Privy Council that such dismissal did not operate to give a fresh starting point of limitation under clause 2. But it is not clear whether the order of dismissal in this case was one by the Judicial Committee itself or one by the office of the Privy Council as in the case of *Batuk Nath v. Munni Dei*.⁵

In the third case which came before the Privy Council in regard to this question, *Sachindra Nath v. Maharaj Bahadur*,⁶ the dismissal for want of prosecution was in respect of an appeal to the Privy Council and the dismissal order was not by the Privy Council itself but by the office of the Privy Council. Their Lordships held that such an order of dismissal was not the final order of an Appellate Court within the meaning of clause 2. But the observations of their Lordships are *general* and are not confined to cases where the dismissal of the appeal is by the office of the Court and not by an order of the Appellate Court.

In *Abdulla Ashgar Ali v. Ganesh Das Vig*,⁶ the question was as to whether an order of an Appellate Court declaring an appeal to have abated was a final order within clause 2. The Privy Council held that such an order was a judicial order of an Appellate Court which came within the purview of clause 2. In doing so, the Privy Council distinguished the case of *Abdul Majid v. Jawahir*.⁴ The observations made by their Lordships with regard to this case indicate that in the view of the Judicial Committee, an order dismissing an appeal for default of prosecution, although such an order is passed by the Appellate Court itself and not by the office of the Court, is not a judicial order and hence is not capable of furnishing a fresh starting point of limitation under clause 2. After distinguishing the case of *Batuk Nath v. Munni Dei*,⁵ their Lordships in referring to the case of *Abdul Majid v. Jawahir Lal*⁴ observed as follows:

"In the second case the question was again as to the effect of the dismissal of an appeal in this Board for want of prosecution. No reference was made to *Batuk Nath's case*,⁵ which had been decided less than a month before, and it does not appear whether the dismissal had been under the Order in Council, but the effect of the decision was the same. Lord Moulton in delivering the judgment of the Board, says. 'The chief matter of argument before this Board was a contention that the decree which it is sought to enforce had been constructively turned into a decree of His Majesty in Council and assigned to the date of 13th May 1901, by virtue of the dismissal of the appeal for want of prosecution on that date, and that therefore the period

4. (1914) A I R 1914 P C 66 (67) : 36 All 350 : 23 Ind Cas 649 (P C), (Reversing 7 Ind Cas 926.)

5. (1922) A I R 1922 P C 187 (190) : 49 Cal 203 : 48 Ind App 335 : 74 Ind Cas 660 (P C).

6. (1933) A I R 1933 P C 68 (70) : 142 Ind Cas 326 : 60 Ind App 83 : 60 Cal 662 (P C).

of limitation was twelve years from 13th May 1901, by virtue of Article 180, Limitation Act (1877). [Under Article 180, twelve years were allowed for the execution of an order of His Majesty in Council.] Their Lordships see no foundation for this contention which appears to have been the basis of the decision of the Courts below. The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit, and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellant had not complied with the conditions under which the appeal was open to him and that therefore he was in the same position as if he had not appealed at all.

"In the case now before their Lordships it is manifest that there was an order of the Appellate Court and that it did deal judicially with the matters before it"

Thus, it would appear that in the view of the Board as expressed above, even on the assumption that the order dismissing the appeal for want of prosecution which was in question in the case of *Abdul Majid v. Jawahur Lal*¹ had been passed by the Judicial Committee (the Appellate Court in question in the case) itself, it was not a 'judicial order' of the Appellate Court so as to give a fresh starting point of limitation under clause 2.

43. Order returning appeal for presentation to proper Court.—Where an appeal is presented to a wrong Court and is returned by such Court for presentation to the proper Court, the order returning the appeal is not the final order of an Appellate Court within clause 2¹

44. "Appellate Court," meaning of.—The words "Appellate Court" in clause 2 refer to the Court to which the appeal *has been preferred* and such Court is no less an "Appellate Court" because the appeal has been rejected as incompetent.¹ But where the Court to which an appeal is presented has (independently of the question of the competency of the appeal) *no jurisdiction* to entertain the appeal, as where an appeal from the decree of a Civil Court is presented to a Revenue Court, the Court to which the appeal has been preferred will not be an "Appellate Court" within the meaning of the clause. Thus, where an appeal is presented to a wrong Court and is returned for re-presentation to the proper Court, the order returning the appeal will not be the order of an Appellate Court within this clause². In other words, the term "Appellate Court" in the clause

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(Clause 2)
Notes 42-45

Note 43

1. (1920) A I R 1920 Mad 592 (593) 43 Mad 835 60 Ind Cas 267, *Mahomed Abdul Kadir Marakayar v. Saru Pandia Tettar*

Note 44

1. (1882) 9 Cal 100 (102), *Wazir Mahlon v. Lulit Singh*.
2. (1920) A I R 1920 Mad 592 (593) 43 Mad 835 60 Ind Cas 267, *Mahomed Abdul Kadir v. Saru Pandia Tettar*.

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(Clause 2)
Notes 44-46

refers to a Court to which the appeal in question has been presented and which, apart from the question of the competency of the appeal, has jurisdiction to dispose of it.

45. Withdrawal of appeal. — Under the Acts of 1871 and 1877, there was a conflict of decisions as to whether a fresh period of limitation could be counted under clause 2 where the appeal was withdrawn.¹ This conflict has been set at rest by the insertion of the words "or the withdrawal of the appeal" in clause 2 in the Act of 1908 and it is now clear that the fresh starting point of limitation under clause 2 will be available even where the appeal is withdrawn.²

46. Starting point under clause 2. — Under this clause, where there has been an appeal, limitation for execution runs from the date of the final decree or order of the Appellate Court.¹

A decree for possession was passed by the trial Court. The decree gave the defendant one month from the date of the decree to vacate

Note 45

1. (1876) 1 All 293 (295) : 1 Ind Jur 450, *Hingan Khan v. Ganga Parsad*. (No
 (Do)
Shiwargar Budhagar. (Do)
 (1890) 15 Bom 370 (375) : 1890 Bom P J 336, *Patloji v. Ganu*. (Do)
 (1908) 1908 Pun L R No. 87 : 1908 Pun Re No. 54 : 1908 Pun W R No. 40,
Bhagwan Singh v. Mohan Lal. (Do)
 (1891) 1 Mad L Jour 745 (746), *Kanara Kurup v. Govinda Kurup*. (Do.)
 (1907) 80 Mad 1 (2) : 16 Mad L Jour 393 : 1 Mad L Tim 233 (F B), *Sada-
 gopa Ramanuja Periya Jeeyangar v. Lakshmi Doss*. (Fresh starting-
 point applies.)
2. (1926) 94 Ind Cas 390 (391) (All), *Ramchandra Naul v. Nasar Ali*

Note 46

1. (1905) 1905 Pun L R No. 154 : 1905 Pun Re No. 8 : 1905 Pun W R 22,
Ralla Mal v. Mt. Malan (When an application for revision is
 admitted by the Chief Court, not as a petition for revision but as a
 further appeal, the ultimate order, passed therein rejecting the appli-
 cation, ought to be treated as the final order or decree of the Appellate
 Court for the purpose of clause 2.)
- (1880) 2 Mad 174 (175), *Venkatrayalu v. Narasimha*. (Time runs from
 appellate decree, though an application for the execution of the lower
 Court's decree has been already filed before the appellate decree is
 passed.)
- (1876) 25 Suth W R 309 (310), *Mullick Mahomed Yakob v. Chowdhry
 Shaikh Zuhoorul Hug*. (Application for refund of money deposited as
 costs—Limitation for such an application runs from the date of trial
 order in appeal entitling the applicant to a refund and not from the
 date of original order entitling him to such refund.)
- (1871) 1871 P. B. 303 (304), *Ben Kant*

the land. The defendant appealed against the decree. The appeal was dismissed. It was held that limitation ran from the date of the appellate decree and not from the expiry of one month from such decree.²

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(Clause 3)
Notes 46-48**

47. Who is entitled to benefit of clause 2. — Pending an appeal against a decree, the decree was assigned to another. But the assignee was not brought on the record of the appeal. It was held that nevertheless the assignee was entitled to calculate limitation for his application for execution, from the date of the appellate decree.¹

CLAUSE 3.

48. "Where there has been a review of judgment." — There is a difference of opinion on the question whether the expression "review of judgment" in clause 3 of this Article is restricted to the meaning it has under Order 47 of the Code of Civil Procedure, or whether it will include any proceeding by which a Court reconsiders its own judgments, such as a proceeding to set aside a decree passed *ex parte* or a dismissal for default. It was held in some cases under the Act of 1877 which did not contain any clause corresponding to the present clause 4, that where a decree had been amended, it might be regarded as a review of judgment within the meaning of clause 3 of Article 179, corresponding to the present clause 3.¹ Those cases are no longer law in view of the introduction of clause 4 in the present Article providing for limitation in the case of amended decrees. The High Court of Allahabad has, in a case under the present Article, held that the words "review of judgment" must be applied strictly to a "review of judgment" as used in other portions of the same Schedule.² Pullan, J., observed as follows

"The Limitation Act is of the year 1908, the same year in which the Civil Procedure Code was amended, and there is no reason to suppose that the words "review of judgment" have a different significance in the Limitation Act from that which they bear in the Civil Procedure Code, and we find that Articles 161 and 162 provide for limitation for applying for a review of judgment, whereas Article 164 deals with an application for setting aside an *ex parte* decree"

The High Court of Patna has taken a contrary view.³ According to it, all cases in which the Court reconsiders its own judgment are cases of review within the meaning of clause 3, and consequently

2 (1937) A I R 1937 Cal 729 (729) I L R (1938) 1 Cal 171 175 Ind Cas 535, *Basant Kumar Pal v. Barley Bahaman Nasskar*

Note 47

1. (1930) A I R 1930 All 880 (382) 121 Ind Cas 189, *Banke Dohari Lal v. Raghubar Dayal*

Note 48

1. See Note 50 *infra*

2. (1932) A I R 1932 All 601 (602) 138 Ind Cas 692, *Sushnandan Singh v. M. Ramdett Aunicar*

3 (1937) A I R 1937 Pat 337 (341) 16 Pat 306 169 Ind Cas 581, *Firm Dedhray Lachmi Narain v. Bhagwan Das*

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(Clause 3)
Note 48

a restoration of a suit or appeal dismissed, will be a review of judgment within the meaning of clause 3. Courtney-Terrell, C. J., observed as follows:

"Now there is no essential difference between orders for restoration and orders for review. Notwithstanding the heading in Order 47, the matters dealt with in that Order are reviews for which applications are made on certain specified grounds and it is true that in common parlance the term "review" is used for applications based upon the grounds specified in that Order. No Court, having once passed a judgment, can alter the terms of that judgment save upon specified grounds, and one of those grounds is dealt with under the term "restoration." In both cases, however, the Court has first to decide whether on the ground specified it is justified in law in reconsidering its own decision, and it either allows or refuses the application for reconsideration.

"In some cases, after the decision to reconsider it may be necessary, at a subsequent and separate hearing, to deal with the fresh case on its merits. In some cases, the matter is dealt with at the same hearing and in one judgment the Court decides, firstly, whether the case should be reconsidered and secondly, the result of its reconsideration. But all cases in which the Court reconsiders its own judgment are cases of review within the meaning of clause 3 of Article 182, Limitation Act. Applications for restoration and applications for review (using the word in the narrower sense) are, it is true, separately dealt with in the Orders appended to the Civil Procedure Code. These are mere questions of procedure and may be altered by any particular High Court; but the entire jurisdiction of any Court to interfere with its own decision once given is derived from Section 114 of the Code itself where the single word "review" is used."

It is submitted that the Allahabad view is to be preferred. According to the reasoning of the High Court of Patna, even an amendment of the decree will be a review. This view, however, which, as seen already, had been held under the Act of 1877, has been impliedly negated by the Legislature by the introduction of clause 4 of the present Article.

There is also a difference of opinion on the question as to whether clause 3 applies only where a review has been *granted* or whether it will apply even where the review has been *refused*. The words "where there has been a review of judgment" make it quite clear that it is only where a review has been *granted* by the Court that the clause applies, and this is the general trend of opinion.⁴ A contrary view has, however, been held by the High Court of Patna.

4 (1866) 5 Sath W R (Misc) 45 (46), *Chowdhry Junmenjoy Mullick v. Bissam-bhur Panjah*.

(1922) A I R 1922 Oudh 148 (148) : 24 Oudh Cas 280 : 66 Ind Cas 205, *Raja Bhagwan Baksh Singh v. Mt. Manrajs Kunwar*.

namely, that the clause will apply even where an application for review has been *dismissed*, and that time for an application for execution of the decree will run from the date of the dismissal of the application for review.⁵ It is submitted that this view is not correct.

Where an application for review has been *granted*, but the order granting the review is appealed against, clause 2 must be applied along with clause 3, and time for an application for execution will run from the date of the decision in appeal. See Note 34 *ante*

49. Review in part. — Where a decree is reviewed at the instance of some of the defendants, limitation for the execution of the decree runs from the date of the revised decree even as against the defendants who are not parties to the review proceedings.¹ This is in accordance with the principle of interpretation laid down by their Lordships of the Privy Council in *Nagendra Nath v. Suresh Chandra*² in construing clause 2 of this Article which contains the expression "where there has been an appeal" Their Lordships there observed as follows :

"There is no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it, the words mean just what they say "

CLAUSE 4.

50. "Where the decree has been amended." — There was no provision corresponding to clause 4 of this Article, in Article 179 of the Act of 1877, and there was a conflict of opinion as to whether a fresh starting point for execution was furnished by the amendment of a decree. According to one class of cases, the amendment of a decree was regarded as a review of judgment within the meaning of clause 3 of Article 179 and was held to furnish a fresh starting point under that clause.³ A contrary view was taken in another class of cases, namely that an amendment could not be

(1886) 10 Mad 66 (67), *Kurupam Zamindar v. Sadasuta*.

(1917) A I R 1917 Pat 157 (158) . 44 Ind Cas 575 3 Pat L Jour 119, *Ras Brijraj v. Nauratan Lal*.

(1932) A I R 1932 All 601 (602) 135 Ind Cas 692, *Sukhnandan Singh v. Mt. Ramdevi Kunuar*.

5 (1937) A I R 1937 Pat 337 (339, 341) 16 Pat 306 169 Ind Cas 541, *Firm Dadhraj Lachminarain v. Bhagwan Das*

Note 49

1. (1933) A I R 1933 Mad 276 (277) 141 Ind Cas 175, *Vasireddy Ramayya v. Mulugu Kotayya*.

(1912) 12 Ind Cas 679 (682) 35 Mad 670, *Abdul Kadir v. Ajayur Ahammed* (Per Sundara Iyer, J., approved in A I R 1916 Mad 1)

2. (1932) A I R 1932 P C 165 (167) 137 Ind Cas 529 59 Ind App 283 60 Cal 1 (P C).

Note 50

1. (1897) 25 Cal 254 (261, 262) 2 Cal W N 219, *Kali Prosanno Das v. Lal Mohan Guha*

(1912) 13 Ind Cas 140 (142) (Cal), *Rameswar Singh v. Tirpiti Singh*

(1881) 4 All 137 (141) 1881 All W N 152, *Kishen Sahai v. Collector of Allahabad*.

Article 162
(Clause 4)
Note 50

regarded as a review, and that it did not furnish any fresh starting point for execution.²

The introduction of clause 4 in the present Article has now set the conflict at rest. The Legislature must be taken to have impliedly negatived the view that an amendment might be considered to be a review of judgment, though it considered that an amendment should furnish a fresh starting point for execution.

There is a difference of opinion on the question whether the amendment referred to in the clause includes amendments of *verbal* and *clerical* errors, and amendments in respect of matters which do not stand in the way of execution of the decree. It was held in the undermentioned cases³ that the amendment of a mere clerical or verbal error will not furnish a fresh starting point under the Article.

It was assumed in *Mt. Maharani v. Debi Das*,⁴ that an amendment will not furnish a fresh starting point, unless, in the absence of it, the decree was incapable of execution. A contrary view, namely, that time will run from the date of the amendment irrespective of the character or nature of the amendment, has been held in other cases.⁵

2. (1905) 27 All 575 (577) : 1905 All W N 108 : 2 All L Jour 287, *Ashan-Ullah v. Dakhnidin*.

- (1898) 20 All 304 (307) : 1898 All W N 43, *Daya Kishan v. Nanhi Begum*.
(1891) 13 All 124 (126) : 1891 All W N 32, *Kelly Bai v. Fakhman*.

- (1891) 13 All 124 (126) : 1891 All W N 32, *Kallu Rai v. Fakiman.*

- (1909) 3 Ind Cas 391 (1902) (Cal), *Chhotu Bakhhal Das v. Jogendra Narain*.
(*Quare* Whether an application for amendment of a decree so as to bring it into conformity with the judgment is an application for review.)

- (1907) 1907 All W N 169 (169) : 4 All L Jour 469, *Arcadh Bihari Pande v. Mahadeo Sahi*.

- 3 (1938) A I R 1938 Pat 57 (59) 16 Pat 453 : 174 Ind Cas 418, *Rameshwar Narain v. Raghunandan*, (Amendment must be one in the real sense of the term in order to give a fresh start)

- (1932) A I R 1932 Oudh 293 (296) : 140 Ind Cas 412, *Mohammad Mumtas Ali v. Mohammad Saadat Ali*

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- (1917) A I R 1917 Pat 517 (518) , 99 Ind Cas 624 • 2 Pat L Jour 286, *Adala-
nand Singh v. Rajkumar Singh*.

- (1937) A I R 1937 Cal 581 (583) : 173 Ind Cas 584, *Sureshwar Prasad v. Maharaj Bahadur Sinha* (Mera verbal corrections which are unnecessary—No amendment within Cl. 4.)

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- (1928) A I R 1928 Oudh 412 (448) 8 Luck 719. 116 Ind Cas 49, *Narotam Das v. Sukhraj Singh*.

- (1935) A I R 1935 Mad 97 (98) · 58 Mad 743: 154 Ind Cas 817, *Lakshmi Kant Rao v. Ramayya*.

- (1934) A I R 1934 Oudh 289 (291) · 150 Ind Cas 947, *Narottam Dass v. Atul Chandra*.

- (1934) A I R 1934 Oudh 43 (44) : 147 Ind Cas 815, *Haidri Khanam v. Dhanwan Shanhar*. (Assumed.)

In *Aditya Kumar Bhattacharjee v. Abinash Chandra*,⁶ the Calcutta High Court observed as follows :

**Article 182
(Clause 4)
Note 50**

"That time should run from the date of the decree as amended has been recognized by the Legislature by the amendment of the Limitation Act in 1908. With regard to the time from which limitation for execution of a decree should be counted, there was a great divergence of opinion between the Allahabad High Court on the one side and almost all the other High Courts on the other. The conflict was set at rest by adding clause 4 to Article 182, Limitation Act, 1908, which says that limitation for purpose of execution should commence from the date of the amended decree. It does not specify the nature of the amendment and therefore it must be said to include all kinds of amendments, whether under Section 152 or under Order 47, Civil Procedure Code, or any other provision of law."

In *Lakshmikanta Rao v. Ramayya*,⁷ Beasley, C. J., observed as follows

"It is argued that the amendment of the decree was merely a formal one and that the final decree was an executable one even in its unamended form. In our view we are not concerned with that. The words of Article 182 clause 4, Limitation Act, are where a decree has been amended, a period of three years' limitation is given starting from the date of the amendment of the decree. It was the amended decree that the decree-holder sought, by his subsequent application, to execute. We propose to give the words of that Article of the Limitation Act their plain meaning, following the principle of construction laid down by the Privy Council in A I R 1932 P C 165."

It is submitted that the view last stated is correct and is in consonance with the decision of their Lordships of the Privy Council in *Nagendranath v. Suresh Chandra*,⁸ that the language of the

(1886) 8 All 492 (493) 1886 All W N 156, *Tarsi Ram v. Man Singh* (Do)

(1916) A I R 1916 Cal 511 (513) 32 Ind Cas 744, *Anandram v. Nityananda Barham* (Do)

[See also (1914) A I R 1914 Mad 392 (393) 22 Ind Cas 283, *Dola Khodalo Patro v. Lingarajrudya Bhushano* (Nature of amendment not clear)]

(1917) A I R 1917 Lah 719 (720) 100 Ind Cas 164, *Pareem Chand v. Budha* (Do)

(1927) 99 Ind Cas 201 (205) (Oudh), *Narotam Dass v. Narain Das* (Do)

(1921) 60 Ind Cas 318 (319) (Pat), *Baldeo Shukul v. Syed Yusuf* (Do)

(1934) A I R 1934 Mad 283 (285) 57 Mad 795 143 Ind Cas 1033, *Thiagaraja Thevar v. Sambasiva Thevar*

(1935) A I R 1935 All 606 (607) 155 Ind Cas 425, *Bahal Singh v. Mt. Chameli* (Fresh decree passed by way of amendment—Time runs from date of amended decree)]

6. (1931) A I R 1931 Cal 323 (326) 131 Ind Cas 258.

7. (1935) A I R 1935 Mad 97 (98) 58 Mad 743 154 Ind Cas 647.

8. (1932) A I R 1932 P C 165 (167) 137 Ind Cas 529 59 Ind App 283 : 60 Cal 1 (P C)

Article 182
(Clause 4)
Note 50

Article must be given its plain meaning, that in construing its provisions equitable considerations are out of place, and that the strict grammatical meaning of the words is the only safe guide.

There is also a difference of opinion as to whether a fresh starting point is given by the amendment of the decree *after* it is barred by limitation.

One view is that at the date of the amendment the decree must have been alive and that otherwise clause 4 will not apply.⁹ Thus, it was observed in *Haidri Khanam v. Bhawaní Shankar*¹⁰ as follows:

"It seems to us that clause 4, Article 182, presupposes that at the time of amendment the decree is alive. The basic idea underlying Article 182 is that the decree is subsisting at the various points of time from which the limitation starts to run under the provisions of column 3 of the Article. It would not be consistent with the obvious intention of the Legislature to hold that the decree-holder can get a start for limitation from the date of amendment even in a case where the decree had already been barred by time when the amendment was made."

In *Rahruddin v. Ram Kanai Sen*,¹¹ their Lordships of the Calcutta High Court held that a "decree which is capable of execution and is not executed within three years from its date becomes dead and cannot be revived by a subsequent application for amendment." The High Court of Madras also observed in the undermentioned case¹²: "If the literal construction of Article 182 clause 4 is to be accepted, then it would enable a decree-holder to execute a barred decree."

A *second* view is that if the *application* for amendment was made within three years of the decree, clause 4 will apply even though the actual amendment is ordered after three years of the decree.^{12a}

9. (1924) A I R 1924 Lah 329 (329) 73 Ind Cas 461, *Jhamman Lal v. Daulat Ram*.

(1933) A I R 1933 Mad 815 (319) . 56 Mad 458 : 148 Ind Cas 58, *Ahamad Kutty v. Kottakkat Kutty*.

(1916) A I R 1916 Cal 511 (513) : 32 Ind Cas 744, *Anandram v. Nityananda Barham*.

(1920) A I R 1920 Cal 769 (769) . 59 Ind Cas 186, *Rahruddin v. Ram Kanai Sen*.

(1886) 8 All 492 (494) : 1886 All W N 150, *Tarsi Ram v. Man Singh*.

(1917) A I R 1917 Pat 517 (518) . 39 Ind Cas 624 : 2 Pat L Jour 296, *Kalanand Singh v. Rajkumar Singh*.

(1934) A I R 1934 Oudh 43 (44) 147 Ind Cas 815, *Haidri Khanam v. Bhawaní Shankar*.

10. (1934) A I R 1934 Oudh 43 (44) 147 Ind Cas 815.

11. (1920) A I R 1920 Cal 769 (769) . 59 Ind Cas 186.

12. (1933) A I R 1933 Mad 815 (318) : 56 Mad 458 : 148 Ind Cas 58, *Ahamad Kutty v. Kottakkat Kutty*.

12a (1930) A I R 1930 Pat 286 (233) 9 Pat 782 : 125 Ind Cas 785, *Mt. Bhagwati Kuer v. Narsingh Narayan Singh*.

A third view contrary to the first view has been held in other cases.¹³ In *Lakshmikanta Rao v. Ramayya*,¹⁴ it was observed that the fact that the decree had already become barred at the date of the amendment or that the amendment applied for was unnecessary, were matters to be dealt with by the Court to which the application had been made for the amendment and that the effect of Article 182 clause 4 is that it is a complete answer to any objection taken with regard to the plea of limitation so far as the earlier decree was concerned. In *Narottam Dass v. Atul Chandra*,¹⁵ it was held that it was not within the province of the executing Court to question whether or not the amendment was properly made, that its duty was confined to execution only and that if it found that an application for execution had been made within three years of the date of the amended decree, then its duty was to proceed with the execution. In *Magan Lal v. Sitaram*,¹⁶ Wort, J., observed as follows :

"The question is in a sense determined on the principle of *res judicata*. When the application for amendment was made, it would have been a complete answer by the judgment-debtor to the application that the decree was already dead in the sense of its being barred by limitation, and the amendment having been made, it must be presumed that that question had no substance. As held by the learned Judges of the Madras High Court, it was not competent for the Court below in this case to sit in appeal on the decision of the Court amending the decree "

It is submitted that the third view is correct on principle

Where a decree, as framed, is incapable of execution, it has been seen already that time does not run against the decree-holder. Where such a decree is amended and thus becomes capable of execution, it is clear that limitation will, under clause 4, run from the date of the amendment.¹⁷

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13. (1934) A I R 1934 Oudh 289 (291) 150 Ind Cas 947, *Narottam Dass v. Atul Chandra*
 (1929) A I R 1929 Cal 650 (651) 125 Ind Cas 292, *Durga Prasad Das v. Kedarnath Nayak*
 (1937) A I R 1937 Pat 316 (316) 167 Ind Cas 134 16 Pat 290, *Magan Lal Marwari v. Sitaram Panna Lal* (A I R 1917 Pat 517 held overruled by A I R 1932 P C 165)
 (1928) A I R 1928 Oudh 442 (448) 3 Luck 719 116 Ind Cas 49, *Narottam Das v. Sukhraj Singh*
 (1938) A I R 1938 Pat 57 (59) 16 Pat 453 174 Ind Cas 418, *Rameshwar Narain v. Raghunandan.*
 (1935) A I R 1935 Mad 97 (9-) 58 Mad 743 151 Ind Cas 847, *Lakshmikanta Rao v. Ramayya*
14. (1935) A I R 1935 Mad 97 (9-) 58 Mad 743 151 Ind Cas 847
15. (1934) A I R 1934 Oudh 289 (291) 150 Ind Cas 947
16. (1937) A I R 1937 Pat 316 (316) 16 Pat 290 167 Ind Cas 134.
17. (1926) A I R 1926 All 884 (386) 48 All 2-1 94 Ind Cas 877, *Delal Bhatti v. Shambhu Dial Ganji Prasad*
 (1913) 21 Ind Cas 613 (616) (Cal), *Maharaja Prasad Singh v. Abdul Hamid*

**Article 182
(Clause 5)
Notes 50-51a**

Where an execution petition is filed beyond time and *subsequent* thereto the decree is amended, the amendment will not save the application already made from the bar of limitation, though the case may be different where another application for execution is made after the amendment.¹⁸

The words "date of amendment" refer to the date of the Court's order directing the amendment and not the date on which the decree is actually altered or corrected.¹⁹

It has been held by their Lordships of the Privy Council in the undermentioned case²⁰ that where an amendment is made by a Court *without jurisdiction*, the amendment has no operation, and time for execution will run only from the date of original decree.

51. Where amended decree is appealed against. — See Note 39, *ante*.

CLAUSE 5.

51a. Where a previous application has been made. — Clause 5 provides that where there is a previous application for execution or to take a step-in-aid of execution, time runs from the date of the final order on such application. Before the amendment of the clause by Act 9 of 1927, time ran from the date of the application and not from the date of the final order on the application.¹

- (1921) A I R 1921 Cal 89 (90) : 64 Ind Cas 622, *Sanaton Sant v. Dnabandhu Giri*
 (1907) 11 Oudh Cas 22 (25), *Mt. Zubra Bibi v. Mt. Zulakha Bibi*.
 (1908) 5 All L Jour 403 (404) : 1908 All W N 191, *Bihari v. Risal*.
 18. (1936) A I R 1936 Mad 434 (431) : 161 Ind Cas 969, *Administrator-General, Madras v. Radhakrishna Chelthar*.
 19. (1926) A I R 1926 Mad 747 (747) : 49 Mad 807 : 95 Ind Cas 196, *Venkataswami Naidu v. Venkatasubba Naidu*.
 (1916) A I R 1916 Pat 278 (278) : 36 Ind Cas 533, *Nirit Lal Jha v. Kalanand Singh*
 20. (1900) 24 Mad 1 (18) : 2 Bom L R 771 : 27 Ind App 197 : 10 Mad L Jour 221 : 4 Cal W N 725 : 7 Sar 678 (P C), *Venkata Subbamma Rao v. Venkatarama Rao*

Note 51a

1. (1934) A I R 1934 P C 14 (16) : 61 Ind App 62 : 147 Ind Cas 323 : 55 All 993 (P C), *Khalilur Rahman Khan v. Collector of Etah*.
 (1915) A I R 1915 All 231 (232) : 28 Ind Cas 391, *Ibrahimji v. Hasamuddin Khan*.
 (1882) 5 All 236 (237) : 1883 All W N 5, *Hulasi v. Masku*.
 (1877) 1 All 580 (582) (F D), *Fakir Mahammad v. Gulam Hussain*.
 (1897) 22 Bom 723 (725), *Trimbak Bapuji v. Kashinath Vidyadhar*.
 (1899) 1 Bom L R 84 (86), *Krishna v. Vishal*.
 (1874) 11 Bom H C R 111 (116), *Gobind Lakshuman v. Narayan Moreshwar*.
 (1895) 1895 Bom P J 129, *Mancha Kasan v. Amtha Hra*.
 (1920) A I R 1920 Cal 22 (24) : 54 Ind Cas 1, *Krishna Prasad v. Dharendra Nath*.
 (1880) 7 Cal L R 424 (427, 428), *Jeebraj Singh v. Buhooria Alumbaset Koer*.
 (1877) 1 Cal L R 252 (253), *Giri Dhari Singh v. Ram Kishore Narain Singh*.
 (1897) 1 Cal W N 260 (262), *Sarat Kumar Das v. Jagat Chandra Roy*.
 (1876) 25 Buth W R 91 (94), *Abdool Hakim v. Shaikh Ascentoolah*.

This was considered to be harsh,² and the clause was amended so as to make time run from the date of the final order on the application. As to the retrospective effect of the amendment, see the unmentioned case.^{2a}

**Article 182
(Clause 5)
Note 51a**

In order that the clause may apply, the following conditions are necessary

1. the application must be one for execution or to take a step-in-aid of execution,
2. the application must be in accordance with the law,
3. the application must be made to the proper Court;
4. there must be a final order on the application.³

The clause will apply only where there has been an *application*. Hence, where no application has been made to any Court but there has been simply a payment made to the decree-holder out of Court, there is nothing to attract the operation of this clause⁴

- (1876) 25 Suth W R 546 (517), *Rajah Nilmony Singh Deo Bahadoor v. Nilcomul Tuppadar*.
 (1875) 23 Suth W R 282 (282), *Fazl Bakhsh Chordhry v. Sadut Ali Khan*.
 (1874) 22 Suth W R 512 (515) 14 Beng L R 143 (T B), *Eshan Chander Bose v. Prannath Nag*.
 (1874) 21 Suth W R 147 (147, 148), *Hunkur Singh v. Madho Lall*.
 (1881) 5 Ind Jur 72 (72), *Vijayarayudu v. Thathayya*.
 (1894) 1894 Pun Re No 89, *Sardar v. Fatteh Chand*.
 (1894) 1894 Pun Re No. 106, *Ghulam Jilani v. Yusuf Shah*.
 (1882) 1882 Pun Re No 151, *Mt. Aziz Bibi v. Ganda Mal*.
 (1926) A I R 1926 Mad 1178 (1180) 50 Mad 49 98 Ind Cas 156, *Krishna Pattar v. Seetharama Pattar*.
 (1923) A I R 1923 Mad 686 (687) 75 Ind Cas 489, *Parthasarathi Chetty v. Abdul Rahman*.
 (1920) A I R 1920 Mad 86 (87) 58 Ind Cas 536, *Rangachariar v. Subramania Chetty*.
 (1891) 7 Mad 80 (82), *Sabhanatha v. Lakshmi*.
 (1931) 1931 Mad W N 413 (414), *Raghava Ayyangar v. Natesan Chettiar*.
 (1875) 8 Mad II C R 97 (98), *Naranappa Aiyar v. Nanna Ammal*.
 (1875) 8 Mad II C R 105 (107), *Mahalakshmi Ammal v. Lakshmi Ammal*.
 (1932) A I R 1932 Oudh 148 (149) 7 Luck 590 137 Ind Cas 768 (T B), *Ram Dharose v. Ramman Lal*.
 (1924) A I R 1924 Pat 576 (578) 3 Pat 596 78 Ind Cas 766, *Mt. Bhagwantha Kuer v. Zamir Ahmad*.
 (1929) A I R 1929 Rang 152 (153) 117 Ind Cas 578 7 Rang 132, *Somasundaram Chettiar v. Ma Shue Thit*.
 (1912) 14 Ind Cas 335 (337) (Lrb), *Ram Das v. Kanshi Ram*.
 (1912) 13 Ind Cas 189 (190) (Cil), *Madan Mohan Day v. Gangachandra Ray*.
 (1911) 9 Ind Cas 213 (215) (Cal), *Mochas Mandal v. Meseruddin Vollah*.
 (1909) 3 Ind Cas 336 (337) (Cil), *Raj Behari Chakravarti v. Kalihar Gupta*.
 2. (1914) A I R 1914 Mad 384 (385) 34 Mad 695 23 Ind Cas 533, *Abdul Kadir Boucher v. Krishna Malamal Nair Karnaran*.
 2a (1930) A I R 1930 Pat 207 (207) 127 Ind Cas 572, *Sapana Patra v. Damodar Kar* (Where the decree is not time barred on 1st Jan 1928, the clause applies although the previous application was before that date).
 3. (1932) A I R 1932 Oudh 148 (149) 137 Ind Cas 768 7 Luck 590 (F B), *Ram Dharose v. Ramman Lal*.
 (1936) A I R 1936 Rang 271 (272) 163 Ind Cas 403 14 Rang 550, *Arjundas Bisumalal v. U Ka Ya*.
 4. (1931) A I R 1931 Oudh 356 (357) 182 Ind Cas 797 7 Luck 382, *Mata Deen v. Mt. Kausilla*.
 See also Note 124 *infra*.

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Similarly, a suit to set aside an adverse order against the decree-holder in a claim case cannot save limitation under this clause.⁵

52. "Application in accordance with law."—The word "law" in the expression "application in accordance with law" means not only the law to be found in the Code of Civil Procedure, but the whole body of law in general applicable to such application.¹

An omission to conform to *any* of the requirements of the law in regard to the particular application may, in one sense, be said to render the application not one in accordance with law. This however is not the view adopted by the generality of decisions. An examination of the cases shows that in order that an application may be considered to be in accordance with law, two elements must exist—

1. the application must be one asking the Court to do something which, by law, that Court is *competent to do*; and
2. apart from the question of competency of the Court to grant the relief claimed, it must be *possible* for the Court, on the particulars furnished by the applicant in his application, to proceed to grant the relief claimed.

1. *Competency to grant relief.* The leading case on the point is *Chattar v. Nawal Singh*,² where the High Court of Allahabad observed as follows.

"I think the term "applying in accordance with law" must mean applying to the Court to do something in execution which, by law, that Court is competent to do. I do not think that it means applying to the Court to do something which, either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law, he must have known the Court was incompetent to do."

This view has been followed in numerous cases.³ An executing Court, for instance, is not competent to grant a relief *not granted by*

⁵ (1889) 17 Cal 268 (271), *Raghunandan Pershad v. Bhugoo Lall*.

[But see (1923) A I R 1923 Oudh 9 (12) : 69 Ind Cas 660 : 26 Oudh Cas 71, *Sheo Ram v. Ram Barosey*. (Submitted not correct)]

Note 52

1. (1937) A I R 1937 Pat 522 (523) : 171 Ind Cas 99, *Firm Johar Mal Paran Ram v. Bindesuar Prasad Singh*.

(1923) A I R 1923 Oudh 9 (13) : 26 Oudh Cas 71 : 69 Ind Cas 660, *Sheo Ram v. Ram Barosey*.

[See also (1890) 13 All 211 (213) : 1690 All W N 230, *Dansi v. Sukree Mal*.]

2. (1889) 12 All 64 (65) : 1889 All W N 200.

3. (1937) A I R 1937 Pat 522 (523) : 171 Ind Cas 99, *Firm Johar Mal Paran Ram v. Bindesuar Prasad Singh*.
 ly against the
 father is not
 der applies for
 application so

made for execution is not one in accordance with law, inasmuch as the Court is not competent to grant the relief prayed for by virtue of the decree.)

(1939) A I R 1939 All 57 (58) : 180 Ind Cas 403 : I L R (1939) All 97, *Sita Ram Rai v. Madho Prasad*.

the decree or which is prohibited by law. Thus, Section 28 of the Provincial Insolvency Act prohibits any proceeding being taken against a person who has been adjudicated an insolvent, except with the leave of the Court. Similarly, under Section 58 of the Civil Procedure Code, a judgment-debtor who has once been arrested in execution of a decree and released from detention under that Section, cannot be re-arrested in execution of the same decree. Again, Section 3 of the Limitation Act provides that every application made after the expiry of the period of limitation prescribed therefor shall be dismissed. An application for a relief not granted by the decree (see Note 53), or which is barred by limitation (see Note 55), or for the re-arrest of the judgment-debtor who has been released from detention under Section 58 of the Civil Procedure Code (see Note 54), or against an adjudicated insolvent without the leave of the Court (see Note 54), cannot therefore be considered to be one in accordance with law within the meaning of this Article. See also the undermentioned case ^{3a}

2. Relief not possible to be granted for want of particulars It is obvious that, in order that the Court may act upon an application

(1906) 28 All 387 (389) 3 All L Jour 143 1906 All W N 54, *Langtu Pande v. Baijnath Saran Pande*.

(1905) 1 Nag L R 61 (63), *Khet Singh v. Onkar Seth*.

(1931) A I R 1931 Pat 274 (275) : 10 Pat 183. 131 Ind Cas 815, *Durga Prasad Sahu v. Mt. Poudharo Kuer*. (Relief, though granted by decree, could not be given owing to subsequent orders)

(1922) A I R 1922 Pat 188 (191) : 67 Ind Cas 533 : 1 Pat 651, *Amrit Lal v. Murlidhar*.

(1926) A I R 1926 All 345 (345, 346) 93 Ind Cas 292, *Ramraj v. Mt. Umraji*. (Application to Court without jurisdiction is not one in accordance with law)

(1916) A I R 1916 Mad 728 (730) 30 Ind Cas 707 39 Mad 923, *Faradaraaya Mudali v. Murugesam Pillai*. (An application made to a Court having no jurisdiction will be treated as waste paper, and such an application to such a Court is also of no value in the eye of law)

(1926) A I R 1926 All 95 (100) 48 All 468 90 Ind Cas 938, *Sheo Prasad v. Mt. Naram Bai* (Do)

Chandra Kanta.

id.

N 182, *Munawar*

(1918) A I R 1918 Bom 236 (237) 46 Ind Cas 56. 42 Bom 420, *Janardan Gotind v. Narayan Krishnaji*.

(1906) 33 Cal 867 (871) 4 Cal L Jour 141, *Purna Chandra Mandal v. Radha Nath Das*.

(1909) 1 Ind Cas 57 (59) (Cal), *Manorath Das v. Ambica Kanta Bese*.

[See also (1881) 4 All 31 (35) 1881 All W N 123, *Muhammad Umar v. Kamila Bibi*.

(1922) A I R 1922 Cal 44 (45) 61 Ind Cas 571, *Sadaya Chandra Jana v. Paresh Nath Ghose*]

[But see (1925) A I R 1925 Oudh 77 (78) 79 Ind Cas 880, *Rudra Pratap Singh v. Sheo Prasad*. (Application for relief that could not be granted by the Court under the *bona fide* belief that they could be granted held to be in accordance with law)]

3a. (1885) 10 Bom 91 (93), *Chatur Khushalchand v. Mahadu*. (An application forbidden by Section 22 of the Dekkhan Agriculturists' Relief Act.)

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for relief, sufficient particulars must be stated therein to enable it to do so. Otherwise, it cannot be said to be in accordance with law.

In the case of applications for execution, Order 21 Rules 11 to 13 of the Civil Procedure Code specify the manner in which such applications should be made, the particulars necessary to be stated and the documents that should accompany the application. But it is not every omission to comply with the said Rules that will disable the Court from proceeding with the execution. The omission to give, for example, the number of the suit or the date of the decree as required by clauses (a) and (c) of sub-rule 2 of Order 21 Rule 11, will not disable the Court from proceeding with the execution of the decree. On the other hand, the omission to give, as required by Rule 13 of Order 21, a description of the property sought to be attached, or the omission to state the mode in which the assistance of the Court is sought, as required by clause (j) of Order 21 Rule 11 sub-rule 2, may make it impossible for the Court to proceed to execute the decree.

In the latter case, clearly, the application cannot be considered to be one in accordance with law.⁴ In the former case, that is, where the omission consists of particulars which are required to be given by Order 21 Rules 11 to 13, but which do not prevent the Court from proceeding with the application, there is a difference of opinion among the High Courts. In *Gopal Sah v. Janki Koer*,⁵ Mr. Justice Prinsep observed as follows:

"It was not an application in accordance with law, because it did not fulfil the requirements of the law. No Court can do otherwise than determine that fact. To find that what the law requires on matters of form need not be complied with to make an application one in accordance with law, seems to me to allow a transgression of the law and yet to find that it has been complied with."

This view has however not been shared in the generality of cases. The test generally applied is, 'Could the Court have proceeded with the execution notwithstanding the defect?' If it could, then the application can be considered to be one in accordance with law, but not otherwise.⁶ In *Pitambar Jana v. Damodar Gachait*,⁷ Mr. Justice Suhrawardy observed as follows:

4 (1918) A I R 1918 Mad 1090 (1093) : 40 Mad 949 : 38 Ind Cas 136, *Natesa Pillai v. Ganapathia Pillai*.

(1938) A I R 1938 Pat 75 (75) : 174 Ind Cas 355, *Lachmi Prasad v. Kapil Deo Ojah*.

(1931) A I R 1931 Nag 154 (155, 156) : 28 Nag L R 7 : 131 Ind Cas 691 (F B), *Gulamali v. Rajkumar Chatterji*.

5. (1895) 23 Cal 217 (223).

6. (1934) A I R 1934 Bom 307 (310) : 153 Ind Cas 273 : 53 Bom 1, *Ramgopal Shrivram v. Ramgopal Bhutada*.

(1937) A I R 1937 Oudh 233 (235) : 167 Ind Cas 34 : 18 Luck 162, *Chandila v. Kamla Prasad*.

See also Notes 53 to 72, *infra*.

7 (1926) A I R 1926 Cal 1077 (1081) : 53 Cal 661 : 98 Ind Cas 166. (20 Cal 388 and 16 Mad 142, *Rehob on*)

"The conclusion at which I have arrived is that the expression 'in accordance with law' in Article 182 clause 5 should be taken to mean that the application though defective in some particulars was such upon which execution could be issued. If the omissions were such as to make it impossible for the Court to issue execution upon it, as was the case in *Asgarali v. Troilokyanath Ghose*⁸ where the list of the properties to be attached and sold was not supplied with the application for execution, it should be held that such an application is not in accordance with law. But where the application is such as to enable the Court to take further steps in execution, it cannot generally be said that such an application, if not defective in material and substantial matters, is an application not in accordance with law."

It would follow from the above discussion that the applicability of the test referred to above for seeing whether an application is or is not in accordance with law has to be determined with reference to the facts and circumstances of each case.⁹ It is, however, necessary to remember that the question whether an application is in accordance with law must be determined with regard to what the law requires to be done *at the time* the application is made. It is not permissible to consider what the law requires to be done *after* the application is made,¹⁰ and a valid application which is in accordance with law at the time it is made cannot be invalidated by any *subsequent* act of default by the decree-holder.¹¹

8. (1890) 17 Cal 637 (639) (F B).

9. (1898) 25 Cal 591 (597) 2 Cal W N 556 (F B), *Gopal Chunder Manna v. Gosam Das Kalay*

(1926) A I R 1926 Cal 1077 (1080) 53 Cal 661 98 Ind Cas 166, *Pitambar Jana v. Damodar Gachait*

(1934) A I R 1934 Bom 907 (310) 153 Ind Cas 273 53 Bom 1, *Ramgopal Shriram v. Ramgopal Bhutada*

(1919) A I R 1919 Lah 95 (96) 49 Ind Cas 982, *Kanya Mal v. Kedar Nath*

(1933) A I R 1933 Sind 341 (343) 27 Sind L R 314 147 Ind Cas 470, *Devraj Multani Sahai v. Fateh Chand Ram Chand*

(1922) A I R 1922 Sind 29 (30) 65 Ind Cas 14 15 Sind L R 156, *Suhagram Tahilram v. Tower*

(1925) A I R 1925 Oudh 399 (400) 66 Ind Cas 591 28 Oudh Cas 382, *Durga Prasad Singh v. Johhoo Ram*

10. (1918) A I R 1918 Pat 547 (548) 47 Ind Cas 993, *Arjun Naik v. Lakhman*. (28 Mad 557 and A I R 1918 All 242, Followed)

(1920) A I R 1920 Cal 172 (172) 55 Ind Cas 231, *Aftapuddin Ahmed v. Jogendra Narain Tewari*.

11. (1938) A I R 1938 Pat 513 (514) 178 Ind Cas 624, *Kameshwar Prasad Singh v. Lala Mal* (Failure of decree holder to get mistake in certificate of non-satisfaction of decree corrected)

(1935) A I R 1935 Nag 1 (2) 153 Ind Cas 955 31 Nag L R 126, *Pulwasa v. Mt. Khairunnissa* (Failure to file succession certificate.)

(1927) A I R 1927 Pat 324 (325) 6 Pat 440 104 Ind Cas 218, *Mt Anka Bibi v. Mahabir Prasad* (Failure to produce succession certificate.)

(1937) A I R 1937 Oudh 233 (235) 167 Ind Cas 34 13 Luck 162, *Chandila v. Kamla Prasad* (Omission to produce copies ordered to be produced under Rules 187 and 188, Oudh Civil Rules)

(1923) 16 All 26 (28) 1923 All W N 197, *Mangal Khan v. Salimullah Khan* (Application unaccompanied by succession certificate)

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Notes 52-53**

It is also to be remembered that the determination of the question whether an application is in accordance with law does not, in any way, depend upon the *result* of the application on the merits.¹²

53. Application for relief not granted by decree.—Execution implies the activity of Courts in assisting the decree-holder to realize the *fruits of his decree*.¹ Where, therefore, the decree does not grant a particular relief, the executing Court is not competent to grant it. An application praying for a relief not granted by the decree is therefore one not in accordance with law.^{1a} In *Bando Krishna Kanbargi v. Narsinha Konher*,² Mr. Justice Chandavarkar observed:

“If the person entitled applies for execution in a mode and for a relief outside the decree, the application is not in accordance with law, for the plain reason that the decree of which the execution is sought is not in reality the decree to which the application professes to relate, but some other decree, one not existing, and therefore, incapable of execution according to law. The decree in such a case not existing, the application made as to it shares its fate and is treated as non-existent.”

In *Ramakrishna Kadirvelusami v. Eastern Development Corporation*,³ where in a suit on a mortgage there was a decree

- (1893) 1893 Pun Re No 54, *Sobha Singh v. Fatta* (Execution application by heir of deceased decree-holder unaccompanied by a succession certificate.)
- (1920) A I R 1920 Cal 172 (172) : 55 Ind Cas 231, *Aftapuddin Ahmed v. Jogendra Narain Tewari*.
[See also (1932) A I R 1932 All 484 (484) : 139 Ind Cas 201, *Dambar Lal v. Chand Mal.*]
12. (1927) 52 Mad L Jour 1 (2) (N I O) Critical Note on 53 Cal 664 : A I R 1925 Cal 1077 : 98 Ind Cas 166, *Pitambar Jana v. Damodar Gachait*. (Result of application is not the test.)
- (1897) 24 Cal 778 (783) . 1 Cal W N 676, *Adhar Chandra Dass v. Lal Mohun Das*.
- (1912) 17 L O 210 (213) : 37 Bom 42, *Bando Krishna v. Narsinha Konher*.
- (1937) A I R 1937 Oudh 293 (235) : 167 Ind Cas 34 : 13 Luck 162, *Chandika v. Kamla Prasad*.
- (1926) A I R 1926 Oudh 616 (617) : 98 Ind Cas 93 : 1 Luck 569, *Gobardhan Dass v. Jang Bahadur*.
- (1922) A I R 1922 Pat 597 (597) : 1 Pat 609 : 69 Ind Cas 668, *Gobardhan Das Dwarka Prasad v. Satishchandra Rai*.
- (1909) 4 Ind Cas 1154 (1155) : 3 Sind L R 171, *People's Bank of India v. Mahomed Ali*
- (1926) A I R 1926 Pat 160 (161) . 90 Ind Cas 847, *Jogendra Prasad Narayan Sinha v. Mangal Prasad Sahu*.

Note 53

1. (1888) 13 Bom 237 (239), *Pandharinath Bapuji v. Lalachand Hatibhai*.
(1909) 4 Ind Cas 1154 (1155, 1156), . 3 Sind L R 171, *People's Bank of India v. Mahomed Ali*. (Application for arrest of legal representative in accordance with law.
- W R No. 95, Ganga Ram
- v. Ali. Lurg.
- [See also (1899) 1 Bom L R 84 (86), *Krishna v. Fithal*]
2. (1912) 17 Ind Cas 210 (212) : 87 Bom 42.
3. (1918) A I R 1918 Mad 396 (397) : 43 Ind Cas 537.

against the mortgaged property but no personal decree against the mortgagor, and the decree-holder filed an application for the attachment and sale of non-mortgaged properties of the mortgagor, the High Court of Madras held that the application was not one in accordance with law. Their Lordships observed :

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"Under the Limitation Act, the application must be one to execute a decree; but, if that decree is non-existent, there can be no application in accordance with law. We are unable to hold that the nature of the relief is immaterial so long as the tabular form is properly filled up."

See also the undermentioned cases.^{3a}

A contrary view, namely, that an application even for a relief not granted by the decree may be one in accordance with law, has been held in the undermentioned case.⁴ It is submitted that this view is not correct.

Where some of the reliefs claimed in the application are granted by the decree, and some not, the application in so far as the former reliefs are concerned, would be in accordance with law, though as to the latter it would not be so.⁵

54. Application against person against whom execution could not issue. — An application for execution in a particular mode against a person who cannot, in law, be so proceeded against, cannot, as has been seen in Note 52 *ante*, be considered to be one in accordance with law. Thus, an application for execution against a discharged insolvent judgment-debtor,¹ or an application for execution against an adjudicated insolvent without the leave of the Court,² is not one in accordance with law. Similarly, an application for execution against a judgment-debtor who is dead on the date of the application,³ or for the *re-arrest* of a judgment-debtor who

3a (1905) 27 All 619 (621) 2 All L Jour 376 : 1905 All W N 132, *Munawar Husain v. Jani Biyas Shanhar*.

(1901) 1901 Pun Re No. 98, *Sri Ram v. Majiuddin*.

4. (1917) A I R 1917 Mad 623 (623) 35 Ind Cas 614, *Ramchandra Naidu v. Tirupathi Naidu*.

5. (1918) 17 Ind Cas 210 (212) 37 Bom 42, *Bando Krishna v. Narasimha Konher*.

Note 54

1. (1924) A I R 1924 Bom 180 (181) 77 Ind Cas 747, *Ghanshamdas Balkrishna-das v. Motchand Horakchand*.

(1939) A I R 1939 Mad 193 (196), *Nagaratnam Pillai v. Ramaswami Iyer*.

2. (1939) A I R 1939 Mad 193 (196), *Nagaratnam Pillai v. Ramaswami Iyer*.
(1936) A I R 1936 Mad 284 (286) 59 Mad 759 162 Ind Cas 376, *Jagdisson Pillai v. Narayanan Chelliar*. (An execution petition filed after the institution of insolvency proceedings without the leave of Insolvency Court cannot be said to be an application in accordance with law.)

3. See Note 55 *infra*.

(1934) A I R 1934 All 463 (464) 56 All 463 148 Ind Cas 1181, *Ramkali v. Bir Bhadarman Tewari*.

(1934) A I R 1934 Pcm 215 (216) 153 Ind Cas 181, *Manjula Bai Kashi Nath v. Pandurang Jajaram*.

(1908) 13 Mad L Jour 37 (37) (N R C).

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has been already released from detention under Section 58 of the Code of Civil Procedure,⁴ is not one in accordance with law. But a judgment-debtor, who has been arrested and released pending insolvency proceedings under the provisions of the Insolvency Act, is not exempted from re-arrest after the obstruction is removed, and therefore an application for the re-arrest of the judgment-debtor under such circumstances cannot be said to be not one in accordance with law.⁵

55. Application barred by limitation. — As has been seen in Note 52, *ante*, 'law' means the *whole body of law* applicable to the particular application in question. An application for execution which is barred by limitation cannot be said to be in accordance with the provisions of the Limitation Act governing such applications and cannot therefore be considered to be one 'in accordance with law.'¹ In *Neelmoney Singh v. Ramjeebun*,² their Lordships of the Calcutta High Court observed as follows :

"The application mentioned as a starting point for a period of limitation in Article 179 clause 4 of Schedule II of the Limitation Act of 1877, must be an application 'in accordance with law.' In this case the application of 16th February 1877, from which it is contended that the period should be computed, was not 'in accordance with law,' as it was made after the period prescribed by the law then in force. It cannot therefore constitute a fresh starting point for limitation."

55a. Application in respect of person or property outside jurisdiction. — A, a decree-holder, applied for execution against B, the judgment-debtor, and stated in his application that B was residing within the jurisdiction of the Court and had also moveable property within such jurisdiction. This was found to be untrue and the application was dismissed. It was held that the application could not, by reason only of the said facts, be considered as not in accordance with law.¹ The Court observed as follows :

(1897) 7 Mad L Jour 840 (840) (N I C), Critical Note on 19 All 337, *Madho Prasad v. Kesho Prasad*

(1897) 19 All 337 (339) 1897 All W N 75, *Madho Prasad v. Kesho Prasad*.

[But see (1893) 17 Mad 76 (78) : 4 Mad L Jour 8, *Samsa Pillai v. Chockalinga Chettiar*. (Following 6 Mad 250 and 10 Cal 541.)

(1933) A I R 1933 Cal 684 (687) : 149 Ind Cas 1024, *Abdus Sattar v. Mohini Mohan Das*]

4. (1889) 12 All 64 (65) : 1889 All W N 200, *Chattar v. Newal Singh*.

5. (1910) 8 Ind Cas 743 (745) : 33 All 279, *Suraj Din v. Mahabir Prasad*. (25 Bom 652, Followed, 12 Cal 652, Not followed.)

Note 55

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: 69 Ind

2. (1881) 8 Cal L R 335 (336).

Note 55a

1. (1933) A I R 1933 Sind 78 (81) : 142 Ind Cas 482 : 27 Sind L R 109, *Achraj-sing Ramsing v. Achrajram Sahni*. (6 Cal 513, Followed.)

"Assuming for a moment that the averment that the judgment-debtor was in Karachi and had moveable property in his possession in Karachi was not true, still the Court was not asked to do that which it was not competent to do. The Court was asked to attach property within its jurisdiction, which it was perfectly competent to the Court to order. If it had been proved by the judgment-debtor to the satisfaction of the Court that there was, as a matter of fact, no property within its jurisdiction to be attached, the applicant would not have been able to secure effective execution of his decree. But that would not vitiate the validity or legality of the application for execution as such. An application is what the applicant asks the Court to do; not what it might turn out to be in the light of the evidence recorded subsequently in connexion with another matter."

Where an application for the attachment of property *bona fide* believed to belong to the judgment-debtor was made, it was held that the fact that, on inquiry it turned out that the property did not belong to the judgment-debtor, will not render the application not one in accordance with law.²

55b. Application for transfer of decree to non-existent Court or to Court without jurisdiction.—An application to Court A for the transfer of a decree to Court B which has no jurisdiction to execute such decree is not an application in accordance with law.¹ The reason is that a Court is not *competent* to transfer a decree to another Court which has no jurisdiction to execute the decree, and that an application to a Court to do that which it is not competent to do is not one in accordance with law. According to the High Court of Madras, these cases must be distinguished from a case where a Court is asked to transfer a decree for execution to a Court *which does not exist at all*, and the application in the latter case would be one in accordance with law.² Their Lordships observed as follows.

"This is not, we think, the same as applying for transmission to a Court which does not exist but which the petitioner wrongly believes to exist. That is a mistake of fact in our opinion There is no ground for holding that the decree-holder was applying for transmission of his decrees for execution to a Court without jurisdiction to execute them. It is not disputed on behalf of the appellants that the decree-holder

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2. (1895) 1895 Pan Re No. 6, *Prabhu Singh v. Bal Kishan*

Note 55b

1. (1939) A I R 1939 All 57 (5-6) 1 L R 1939 All 97 140 Ind Cas 403 *Sita Rani Bai v. Madho Prasad*
- (1922) A I R 1922 Pat 148 (192) 1 Pat 651 67 Ind Cas 533, *Amrit Lal v. Murlidhar*.
- (1932) A I R 1932 Pat 309 (310) 11 Pat 785 142 Ind Cas 155 *Sitai Prasad Shukul v. Balu Lal Shukul*.
2. (1939) 1939 Mad W N 11 (12), *Shanthappa v. Escarpette*.

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wanted his decrees to be transferred to the Bellary District so that they could be executed. He wanted them to be transferred to a Court with jurisdiction to execute them. The sole mistake which he made was not a mistake of law but a mistake in the description of the Court to which he requested that his decrees might be transferred."

It is difficult to see, however, how the *knowledge* of the decree-holder or his *belief* would affect the question whether the application was or was not one in accordance with law.

56. Unstamped applications and applications without the payment of court-fees necessary.—It has been held by the High Court of Madras in *Ramaswami Ayyan v. Sesha Aiyangar*,¹ that the affixing of an insufficient stamp on the application for execution did not render the application illegal and that it would, consequently, give a fresh starting point of limitation. In *Krishnayya v. Sriramulu*,² the same High Court held that an *unstamped* execution application was not necessarily one not in accordance with law. Neither of these decisions made any reference to the provisions of Section 28 of the Court-fees Act, 1870, which enacts that no document which ought to bear a stamp under the Act shall be of *any validity* unless and until it is properly stamped.

Where a decree for partition provided that the plaintiff was not entitled to execute the decree unless he paid the full court-fee on the claim made by him in his suit, and the plaintiff applied for execution without making any such payment, it was held by the High Court of Bombay that the application could not be said to be one not in accordance with law by reason of such non-payment.³ The Court observed :

"It was within the competence of the Court to order partition on court-fee being paid as directed by the decree . . . Upon the plaintiff's application it was competent for the Court to order that the execution should begin on court-fee being paid within a certain date."

This view has been dissented from by the Court of the Judicial Commissioner of Sind.⁴ In that case a decree was passed in a suit falling under Section 11 of the Court-fees Act, 1870, for a larger amount than was claimed in the plaint, and without paying the extra court-fee as required by that Section, the plaintiff applied for execution. It was held that the application was not one in accordance with law, the reason given being that since it was not the duty of any Court to execute the decree where the deficit court-fee was not paid,

Note 56

1. (1883) 6 Mad 181 (182).

2. (1928) A I R 1928 Mad 142 (142) : 106 Ind Cas 485

3. (1909) 5 Ind Cas 601 (602) : 34 Bom 189, *Nathu Bai Kursandas v. Pranji-tan Lalchand*.

4. (1937) A I R 1937 Sind 108 (110) : 31 Sind L R 14 : 170 Ind Cas 493, *Lakshmi Chand Ghandamal v. Firm Gokaldas Ranchordas*.

the application could not be said to have been made to the *proper Court* at all as explained in Explanation II of the Article.

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57. Application for relief in mode not permitted by law.—

An application for a relief, even though granted by the decree, in a *mode which the law does not permit*, cannot be said to be one in accordance with law.¹ Thus, where the decree itself directed the sale of the property in suit, and the application was for the *attachment* of the said property, the High Court of Madras² observed :

"An application for attachment of certain property cannot be treated as an application to execute a decree which directs the sale of that property. As pointed out in *Jogemaya Dassi v. Thackomoni Dassi*,³ the properties attached being mortgaged properties could not be brought to sale under the attachment, and the attachment must therefore be treated as ineffective and infructuous."

An application for execution against the legal representatives of the deceased judgment-debtor, by *arresting and imprisoning* them, has been held to be not one in accordance with law, on the ground that the legal representatives are not liable to be arrested and imprisoned for debts due by the deceased judgment-debtor.⁴

58. Application in respect of decree incapable of execution.

—It was held in the undermentioned case¹ that an application for execution of a decree at a time when it is incapable of execution cannot be considered to be one in accordance with law. The decree in that case was one falling under Section 11, Court-fees Act, and was held incapable of execution until the additional court-fee was paid. This latter view has not been followed in other cases (see Note 56 *ante*).

58a. Application for execution of conditional decree without performing condition.—It has been seen in Note 32 *ante*, that there is a conflict of opinion on the question whether a decree on condition that the plaintiff decree-holder should before execution pay a certain sum of money, is a decree that is immediately capable of execution. According to the High Courts which have taken the view that the decree is immediately capable of execution, an application for execution of such decree without performing the condition

Note 57

3. (1896) 24 Cal 473 (480)

4. (1909) 4 Ind Cas 959 (959) (Lab), *Raichand v. Jhande Khan*

[See also (1937) A I R 1937 Pat 522 (523) 171 Ind Cas 92, *Firm Johar Mal-Paran Ram v. Budeswar Prasad* (Decree not binding on sons—Application for arrest of sons)]

Note 58

1. (1937) A I R 1937 Sind 108 (110) 31 Sind L R 14 170 Ind Cas 493, *Lalchand Ghandamal v. Firm Gopaldas Ranchordas*.

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cannot be said to be not in accordance with law by reason of the non-performance of the condition.¹

59. Application not accompanied by certificate required by law.—It was held in *Manohar v. Gebiappa*,¹ that an application for execution not accompanied by the Conciliator's certificate as required by the Dekkhan Agriculturists' Relief Act, 1879, was not one in accordance with law. This view has however been dissented from in a later case of the same High Court and it has been held that such an application, if it is otherwise in accordance with law, does not become one not in accordance with law by reason of the fact that the certificate does not accompany it.²

Section 29F of the Bombay Gujarat Talukhdars' Act, 1898, provides that on the publication of a notice under Section 29B, no proceeding in execution shall be instituted or continued until the decree-holder files a certificate from the managing officer that the decree claim has been duly submitted or until the expiration of a specified period. In *Hargovind v. Naja Sura*,³ it was held that an application not accompanied by such a certificate was nevertheless one in accordance with law. A contrary view was expressed by Mr. Justice Marten in the same case. In the undermentioned case,⁴ the Sind Judicial Commissioner's Court expressed its preference to Mr. Justice Marten's view.

The failure to produce a *succession certificate* along with an application for execution made by the legal representatives of a deceased decree-holder will not, according to the cases noted below,⁵ render the application not one in accordance with law, the reason being that the Court was in such cases not prohibited from *entertaining* the application, but only from *proceeding* with the execution of the decree.

Note 58a

(1935) A I R 1935 Pesh 129 (130) . 158 Ind Cas 517, *Budhu Ram v. Mushtaq Shah*.

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Note 59

1. (1881) 6 Bom 31 (32).
2. (1915) A I R 1915 Bom 46 (47) . 28 Ind Cas 493, *Sadashiv Venkaji v. Narasing Rao*.
3. (1918) A I R 1918 Bom 73 (75, 76) . 47 Ind Cas 726 . 43 Bom 44.
4. (1937) A I R 1937 Sind 108 (110) ; 31 Sind L R 14 : 170 Ind Cas 493, *Lakshmichand Ghandamal v. Firm Gohaldas Ranchordas*.
5. (1894) 20 Bom 76 (78), *Balkishan Shiwa Bakas v. W'agarsing*.
 (1935) A I R 1935 Nag 1 (2) . 153 Ind Cas 955 : 81 Nag L R 126, *Pilrasao v. Mt. Khairunnissa*.
 (1927) A I R 1927 Pat 324 (325) : 6 Pat 410 : 104 Ind Cas 218, *Mt. Ebi Aisha v. Mahabir Prasad*.
 (1893) 1893 Pun Re No 51, *Sobha Singh v. Fatta*.

60. Omission to sign or verify application.—Sub-rule 2 of Rule 11, Order 21, Civil Procedure Code, requires that every application for execution should be signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. An omission to *verify* the application is only an immaterial defect which will not vitiate the application.¹ There is a difference of opinion as to whether an omission by the decree-holder to *sign* the application is a material defect vitiating the application. In the undermentioned cases² an application neither signed nor verified by the decree-holder but which was signed by his *vakil* who, however, did not profess to be acquainted with the facts of the case, was held to be not in accordance with law. Where an application was signed only by the pleader of the party and he was acquainted with the facts of the case, it was held that the application was not vitiated.³ An application presented by a Mooktear on behalf of all the judgment-creditors, one of whom had signed it, the names of the rest having been appended thereto by the Mooktear, was held by the Calcutta High Court to be one on behalf of all the judgment-creditors, especially where no objection to the form of the application was taken by the Court at its presentation.⁴

Where an application was made by the mother as guardian of the minor decree-holder when he was really a major, it was held by the High Court of Madras that the application was not one in accordance with law.⁵

61. Error in description of suit and names of parties.—Order 21 Rule 11, sub-rule 2 clauses (a) and (b) of the Code of Civil Procedure require a statement of the number of the suit and the names of the parties. But an omission to state these, or an error in stating them, does not render the application invalid.¹

Note 60

- 1 (1906) 3 Cal L Jour 44 (44) (S N), *Jyot Kumar Mukherji v. Natabar Bose*.
(1936) A I R 1936 Pat 62 (63) 159 Ind Cas 491, *Sheonath Prasad v. Benares Bank, Ltd.*
- (1924) A I R 1924 Pat 23 (24) 2 Pat 609 74 Ind Cas 174, *Bhagirat Prasad Singh v. Dwarka Prasad Singh* (Verification by one only of several applicants)
- 2 (1930) 185 Ind Cas 15 (15) (Mad), *Sanguliya Pillai v. Muthu Chettiar*
(1936) A I R 1936 All 17 (18) 159 Ind Cas 752, *Raja Ram Gopal Singh v. Harish Chandra Lal*
(See also (1903) 26 All 19 (21) 1903 All W N 172, *Kasumji v. Beni Prasad*)
- 3 (1929) A I R 1929 Bom 196 (196) 117 Ind Cas 526, *Hassan Saheb v. Ramchandra Appayya*
(1903) 26 All 154 (155) 1903 All W N 209, *Dishar Sajjad v. Udit Narain Singh*
- 4 (1873) 4 Cal 605 (606), *Autoo Misree v. Bidhoomoolkee Dabee*
- 5 (1905) 29 Mad 396 (396) 1 Mad L Tim 113, *Saramma v. Seshayya*

Note 61

- 1 (1935) 42 Cal W N 842 (843), *Brin Lohan Behari Bose v. Menmotha Nath Dwari*. (Execution application otherwise correct, wrongly describing a suit to be a small cause case)

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cannot be said to be not in accordance with law by reason of the non-performance of the condition.¹

59. Application not accompanied by certificate required by law.—It was held in *Manohar v. Gebiappa*,¹ that an application for execution not accompanied by the Conciliator's certificate as required by the Dekkhan Agriculturists' Relief Act, 1879, was not one in accordance with law. This view has however been dissented from in a later case of the same High Court and it has been held that such an application, if it is otherwise in accordance with law, does not become one not in accordance with law by reason of the fact that the certificate does not accompany it.²

Section 29E of the Bombay Gujarat Talukhdars' Act, 1888, provides that on the publication of a notice under Section 29B, no proceeding in execution shall be instituted or continued until the decree-holder files a certificate from the managing officer that the decree claim has been duly submitted or until the expiration of a specified period. In *Hargovind v. Naja Sura*,³ it was held that an application not accompanied by such a certificate was nevertheless one in accordance with law. A contrary view was expressed by Mr. Justice Marten in the same case. In the undermentioned case,⁴ the Sind Judicial Commissioner's Court expressed its preference to Mr. Justice Marten's view.

The failure to produce a *succession certificate* along with an application for execution made by the legal representatives of a deceased decree-holder will not, according to the cases noted below,¹ render the application not one in accordance with law, the reason being that the Court was in such cases not prohibited from *entertaining* the application, but only from *proceeding* with the execution of the decree.

Note 58a

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 (1935) A I R 1935 Pesh 129 (180) · 158 Ind Cas 517, *Budhu Ram v. Mushtaq Shah*,
Alai Cheltiar v. Rajappan,
 438, *Mt. Bhurshi v. Bahamata*,
Sarb Rawthen v. Rajagopala

Note 59

1. (1881) 6 Bom 31 (32).
2. (1915) A I R 1915 Bom 46 (47) · 28 Ind Cas 493, *Sadashiv Venkaji v. Narsing Rao*.
3. (1918) A I R 1918 Bom 73 (75, 76) : 47 Ind Cas 726 : 43 Bom 44
4. (1937) A I R 1937 Sind 108 (110) : 31 Sind L R 14 : 170 Ind Cas 473, *Le ... Ranchorodas*.
5. (1894) 20
 (1935) A I R ...
 (1927) A I R ...
Alauddin v. Alahabir Prasad,
 (1893) 1893 Pesh ...
Patla,
Al Khan v. Salim-ullah Khan,
v. Brahmdas,
 (1893) 20 Cal 51 (59) (Cal), *Monorath Das v. Ambika Kanta Das*,
 (1893) 20 Cal 755 (757), *Hafizuddin Chowdhry v. Abdul Aziz*,
 (1892) 19 Cal 482 (484), *Brijonath Surma v. Issur Chandra D*

60. Omission to sign or verify application.—Sub-rule 2 of Rule 11, Order 21, Civil Procedure Code, requires that every application for execution should be signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. An omission to *verify* the application is only an immaterial defect which will not vitiate the application¹. There is a difference of opinion as to whether an omission by the decree-holder to *sign* the application is a material defect vitiating the application. In the undermentioned cases² an application neither signed nor verified by the decree-holder but which was signed by his vakil who, however, did not profess to be acquainted with the facts of the case, was held to be not in accordance with law. Where an application was signed only by the pleader of the party and he was acquainted with the facts of the case, it was held that the application was not vitiated³. An application presented by a Mooktear on behalf of all the judgment-creditors, one of whom had signed it, the names of the rest having been appended thereto by the Mooktear, was held by the Calcutta High Court to be one on behalf of all the judgment-creditors, especially where no objection to the form of the application was taken by the Court at its presentation.⁴

Where an application was made by the mother as guardian of the minor decree-holder when he was really a major, it was held by the High Court of Madras that the application was not one in accordance with law.⁵

61. Error in description of suit and names of parties.—Order 21 Rule 11, sub-rule 2 clauses (a) and (b) of the Code of Civil Procedure require a statement of the number of the suit and the names of the parties. But an omission to state these, or an error in stating them, does not render the application invalid.¹

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Note 60

1. (1906) 3 Cal L Jour 44 (44) (S N), *Jyot Kumar Mukherji v. Nataraj Laxmi*.
(1936) A I R 1936 Pat 62 (63) 159 Ind Cas 494, *Sheonath Prasad v. Bank of India Bank, Ltd.*
- (1924) A I R 1924 Pat 23 (24) 2 Pat 809 74 Ind Cas 174, *Bhagwan Singh v. Dwarka Prasad Singh* (Verification by one only of the applicants)
- 2 (1930) 135 Ind Cas 15 (15) (Mad), *Sanguliyappa Pillai v. Muthu Chettiar*.
(1936) A I R 1936 All 17 (18) 153 Ind Cas 752, *Raja Ram Gopal Lal Harish Chandra Lal*.
[See also (1903) 26 All 19 (21) 1903 All W N 172, *Kasurji v. Prasad*]
- 3 (1929) A I R 1929 Bom 196 (196) 117 Ind Cas 526, *Hassan Shikhat v. Chandra Appaya*.
(1903) 26 All 154 (155) 1903 All W N 209, *Bahar Sajjad v. Ullah Singh*
4. (1873) 4 Cal 605 (606), *Autoo Misree v. Bidhoomookhee Dabee*.
- 5 (1903) 23 Mad 396 (398) 1 Mad L Tum 118, *Saramma v. Seshappa*

Note 61

- 1 (1938) 43 Cal W N 842 (843), *Brindaban Behari Bose v. Mooktear Dwarka*. (Execution application otherwise correct, notwithstanding a suit to be a small cause case.)

59. Application not accompanied by certificate required by law.—It was held in *Manohar v. Gebiappa*,¹ that an application for execution not accompanied by the Conciliator's certificate as required by the Dekkhan Agriculturists' Relief Act, 1879, was not one in accordance with law. This view has however been dissented from in a later case of the same High Court and it has been held that such an application, if it is otherwise in accordance with law, does not become one not in accordance with law by reason of the fact that the certificate does not accompany it.²

The failure to produce a *succession certificate* along with an application for execution made by the legal representatives of a deceased decree-holder will not, according to the cases noted below,¹ render the application not one in accordance with law, the reason being that the Court was in such cases not prohibited from *entertaining* the application, but only from *proceeding* with the execution of the decree.

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v. Rajagopala

(1935) A I R 1935 Pesh 129 (130) . 158 Ind Cas 517, *Budhu Ram v. Mushtaq Shah*.

Note 59

1. (1881) 6 Bom 31 (32).
2. (1915) A I R 1915 Bom 46 (47) 28 Ind Cas 493, *Sadashiv Venkaji v. Nar-sing Rao*.
- 3 (1918) A I R 1918 Bom 73 (75, 76) : 47 Ind Cas 726 : 43 Bom 44.
- 4 (1937) A I R 1937 Sind 103 (110) : 31 Sind L R 14 : 170 Ind Cas 493, *Lakshmichand Ghandamal v Firm Gokaldas Ranchordas*.
- 5 (1891) 20 Bom 76 (78), *Balkishan Shauca Bakas v. Wagarsing*.
- (1935) A I R 1935 Nag 1 (2) 153 Ind Cas 955 : 31 Nag L R 126, *Pilcasano v. Mt Khairunnissa*
- (1927) A I R 1927 Pat 924 (325) 6 Pat 440. 104 Ind Cas 218, *Mt. Dobi Aisha v. Mahabir Prasad*.
- (1893) 1833 Pun Re No 51, *Sotba Singh v. Fatta*.
- (1894) 1894 All 1001, 1002 All 1003, 1004 All 1005, 1006 All 1007, 1008 All 1009, 1010 All 1011, 1012 All 1013, 1014 All 1015, 1016 All 1017, 1018 All 1019, 1020 All 1021, 1022 All 1023, 1024 All 1025, 1026 All 1027, 1028 All 1029, 1030 All 1031, 1032 All 1033, 1034 All 1035, 1036 All 1037, 1038 All 1039, 1039 All 1040, 1040 All 1041, 1041 All 1042, 1042 All 1043, 1043 All 1044, 1044 All 1045, 1045 All 1046, 1046 All 1047, 1047 All 1048, 1048 All 1049, 1049 All 1050, 1050 All 1051, 1051 All 1052, 1052 All 1053, 1053 All 1054, 1054 All 1055, 1055 All 1056, 1056 All 1057, 1057 All 1058, 1058 All 1059, 1059 All 1060, 1060 All 1061, 1061 All 1062, 1062 All 1063, 1063 All 1064, 1064 All 1065, 1065 All 1066, 1066 All 1067, 1067 All 1068, 1068 All 1069, 1069 All 1070, 1070 All 1071, 1071 All 1072, 1072 All 1073, 1073 All 1074, 1074 All 1075, 1075 All 1076, 1076 All 1077, 1077 All 1078, 1078 All 1079, 1079 All 1080, 1080 All 1081, 1081 All 1082, 1082 All 1083, 1083 All 1084, 1084 All 1085, 1085 All 1086, 1086 All 1087, 1087 All 1088, 1088 All 1089, 1089 All 1090, 1090 All 1091, 1091 All 1092, 1092 All 1093, 1093 All 1094, 1094 All 1095, 1095 All 1096, 1096 All 1097, 1097 All 1098, 1098 All 1099, 1099 All 1100, 1100 All 1101, 1101 All 1102, 1102 All 1103, 1103 All 1104, 1104 All 1105, 1105 All 1106, 1106 All 1107, 1107 All 1108, 1108 All 1109, 1109 All 1110, 1110 All 1111, 1111 All 1112, 1112 All 1113, 1113 All 1114, 1114 All 1115, 1115 All 1116, 1116 All 1117, 1117 All 1118, 1118 All 1119, 1119 All 1120, 1120 All 1121, 1121 All 1122, 1122 All 1123, 1123 All 1124, 1124 All 1125, 1125 All 1126, 1126 All 1127, 1127 All 1128, 1128 All 1129, 1129 All 1130, 1130 All 1131, 1131 All 1132, 1132 All 1133, 1133 All 1134, 1134 All 1135, 1135 All 1136, 1136 All 1137, 1137 All 1138, 1138 All 1139, 1139 All 1140, 1140 All 1141, 1141 All 1142, 1142 All 1143, 1143 All 1144, 1144 All 1145, 1145 All 1146, 1146 All 1147, 1147 All 1148, 1148 All 1149, 1149 All 1150, 1150 All 1151, 1151 All 1152, 1152 All 1153, 1153 All 1154, 1154 All 1155, 1155 All 1156, 1156 All 1157, 1157 All 1158, 1158 All 1159, 1159 All 1160, 1160 All 1161, 1161 All 1162, 1162 All 1163, 1163 All 1164, 1164 All 1165, 1165 All 1166, 1166 All 1167, 1167 All 1168, 1168 All 1169, 1169 All 1170, 1170 All 1171, 1171 All 1172, 1172 All 1173, 1173 All 1174, 1174 All 1175, 1175 All 1176, 1176 All 1177, 1177 All 1178, 1178 All 1179, 1179 All 1180, 1180 All 1181, 1181 All 1182, 1182 All 1183, 1183 All 1184, 1184 All 1185, 1185 All 1186, 1186 All 1187, 1187 All 1188, 1188 All 1189, 1189 All 1190, 1190 All 1191, 1191 All 1192, 1192 All 1193, 1193 All 1194, 1194 All 1195, 1195 All 1196, 1196 All 1197, 1197 All 1198, 1198 All 1199, 1199 All 1200, 1200 All 1201, 1201 All 1202, 1202 All 1203, 1203 All 1204, 1204 All 1205, 1205 All 1206, 1206 All 1207, 1207 All 1208, 1208 All 1209, 1209 All 1210, 1210 All 1211, 1211 All 1212, 1212 All 1213, 1213 All 1214, 1214 All 1215, 1215 All 1216, 1216 All 1217, 1217 All 1218, 1218 All 1219, 1219 All 1220, 1220 All 1221, 1221 All 1222, 1222 All 1223, 1223 All 1224, 1224 All 1225, 1225 All 1226, 1226 All 1227, 1227 All 1228, 1228 All 1229, 1229 All 1230, 1230 All 1231, 1231 All 1232, 1232 All 1233, 1233 All 1234, 1234 All 1235, 1235 All 1236, 1236 All 1237, 1237 All 1238, 1238 All 1239, 1239 All 1240, 1240 All 1241, 1241 All 1242, 1242 All 1243, 1243 All 1244, 1244 All 1245, 1245 All 1246, 1246 All 1247, 1247 All 1248, 1248 All 1249, 1249 All 1250, 1250 All 1251, 1251 All 1252, 1252 All 1253, 1253 All 1254, 1254 All 1255, 1255 All 1256, 1256 All 1257, 1257 All 1258, 1258 All 1259, 1259 All 1260, 1260 All 1261, 1261 All 1262, 1262 All 1263, 1263 All 1264, 1264 All 1265, 1265 All 1266, 1266 All 1267, 1267 All 1268, 1268 All 1269, 1269 All 1270, 1270 All 1271, 1271 All 1272, 1272 All 1273, 1273 All 1274, 1274 All 1275, 1275 All 1276, 1276 All 1277, 1277 All 1278, 1278 All 1279, 1279 All 1280, 1280 All 1281, 1281 All 1282, 1282 All 1283, 1283 All 1284, 1284 All 1285, 1285 All 1286, 1286 All 1287, 1287 All 1288, 1288 All 1289, 1289 All 1290, 1290 All 1291, 1291 All 1292, 1292 All 1293, 1293 All 1294, 1294 All 1295, 1295 All 1296, 1296 All 1297, 1297 All 1298, 1298 All 1299, 1299 All 1300, 1300 All 1301, 1301 All 1302, 1302 All 1303, 1303 All 1304, 1304 All 1305, 1305 All 1306, 1306 All 1307, 1307 All 1308, 1308 All 1309, 1309 All 1310, 1310 All 1311, 1311 All 1312, 1312 All 1313, 1313 All 1314, 1314 All 1315, 1315 All 1316, 1316 All 1317, 1317 All 1318, 1318 All 1319, 1319 All 1320, 1320 All 1321, 1321 All 1322, 1322 All 1323, 1323 All 1324, 132

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60. Omission to sign or verify application.—Sub-rule 2 of Rule 11, Order 21, Civil Procedure Code, requires that every application for execution should be signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. An omission to *verify* the application is only an immaterial defect which will not vitiate the application¹ There is a difference of opinion as to whether an omission by the decree-holder to *sign* the application is a material defect vitiating the application In the undermentioned cases² an application neither signed nor verified by the decree-holder but which was signed by his vakil who, however, did not profess to be acquainted with the facts of the case, was held to be not in accordance with law Where an application was signed only by the pleader of the party and he was acquainted with the facts of the case, it was held that the application was not vitiated³ An application presented by a Mooktear on behalf of all the judgment-creditors, one of whom had signed it, the names of the rest having been appended thereto by the Mooktear, was held by the Calcutta High Court to be one on behalf of all the judgment-creditors, especially where no objection to the form of the application was taken by the Court at its presentation.⁴

**Article 182
(Clause 8)
Notes 60-61**

Where an application was made by the mother as guardian of the minor decree-holder when he was really a major, it was held by the High Court of Madras that the application was not one in accordance with law.⁵

61. Error in description of suit and names of parties.—Order 21 Rule 11, sub-rule 2 clauses (a) and (b) of the Code of Civil Procedure require a statement of the number of the suit and the names of the parties But an omission to state these, or an error in stating them, does not render the application invalid.¹

Note 60

1. (1906) 3 Cal L Jour 44 (44) (S N), *Jyot Kumar Mukherji v Natabar Bose*.
(1936) A I R 1936 Pat 62 (63) 159 Ind Cas 494, *Sheonath Prasad v. Benares Bank, Ltd*
- (1924) A I R 1924 Pat 23 (24) 2 Pat 809 74 Ind Cas 174, *Bhagwat Prasad Singh v Dwarka Prasad Singh* (Verification by one only of several applicants)
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4. (1878) 4 Cil 605 (606), *Autoo Misree v Bidhoomoolhee Dabee*
5. (1905) 28 Mad 396 (398) 1 Mad L Tim 113, *Saramma v Seshayya*.

Note 61

1. (1938) 42 Cal W N 842 (843), *Brindaban Behari Bose v. Monmotha Nath Dwari*. (Execution application otherwise correct, wrongly describing a suit to be a small cause case)

**Article 182
(Clause 5)
Notes 61-64**

An omission to mention the names of persons interested in the decree will not make the application not one in accordance with law if it is otherwise in accordance with law.²

62. Omission to give, or error in, date of decree.—Order 21 Rule 11, sub-rule 2 clause (c) of the Code of Civil Procedure requires the date of the decree to be given. But the omission to give it or an error in giving it is not a material defect which will render the application invalid.¹

63. Omission to state whether appeal has been preferred and its result.—Order 21 Rule 11, sub-rule 2 clause (d) of the Code of Civil Procedure requires that the application should state whether an appeal has been preferred from the decree. An omission to comply with this requirement does not render the application one not in accordance with law.¹

64. Omission to state previous adjustments.—Clause (e) of Order 21 Rule 11, sub-rule 2 of the Code of Civil Procedure requires that previous adjustments, if any, should be stated in the application. But an omission to comply with this is not a material omission which would vitiate the application, according to the High Courts of Madras,¹ Calcutta^{1a} and Lahore.² According to the Judicial Commissioner's Court of Nagpur,³ if a decree-holder deliberately omits to mention a certified adjustment, the application is not one in accordance with law.

(1898) 25 Cal 594 (597) : 2 Cal W N 556 (F B), *Gopal Chunder Manna v. Gosain Das Kalay*. (Omission to put the right number of suit.)

(1937) A I R 1937 All 397 (398) : 169 Ind Cas 225, *Hafeez Uddin v. Ram Chander Das*.

(1930) A I R 1930 Mad 172 (173) : 119 Ind Cas 596, *Balambhattu v. Bapanamma*.

(1918) A I R 1918 All 289 (289) : 43 Ind Cas 519, *Ram Lakhan Das v. Shankar Singh*. (Application for execution of the decree in which all the defendants were named, but the minor and his guardian who were both defendants were not described as such)

Misser. (Trivial mistake in writing name of party.)

2. (1931) A I R 1931 Lah 600 (601) : 185 Ind Cas 207, *Ghanaya Lal v. Madho Parshad*.

Note 62

1. (1918) A I R 1918 Pat 41 (51) : 48 Ind Cas 245 : 4 Pat L Jour 213, *Kesh-wesarindra Sahi v. Debendra Bala Dass*.

Note 63

1. (1933) A I R 1933 Mad 872 (874) : 147 Ind Cas 386, *Palli Vittalra Hedges v. Sheenappa Shetty*.

Note 64

1. (1919) A I R 1919 Mad 256 (256) : 51 Ind Cas 114, *Marimuthu Naicker v. Ramaswamy Padayachi*.

1a (1934) A I R 1934 Cal 465 (466) : 151 Ind Cas 1015, *Kangal Chandra v. Nandlal*.

2. (1919) A I R 1919 Lah 95 (96) : 49 Ind Cas 992, *Kanji Mal v. Kaidarnath*.

3. (1924) A I R 1924 Nag 185 (187) : 78 Ind Cas 291, *Mt. Pira Bai v. Bhawani Prasad*.

65. Particulars of previous applications not given.—Order 21 Rule 11, sub-rule 2 clause (f) of the Code of Civil Procedure provides that the application for execution should state whether any and, if any, what previous applications have been made for the execution of the decree, the dates of such applications and their results. It has been held that the omission to state particulars of all the previous applications except the immediately preceding one is not a material omission such as would render it not one in accordance with law.¹ But where particulars of the *immediately previous application* were omitted to be given, it was held in the under-mentioned case² that the defect was a material one as, in the absence of such particulars, it was not possible to say whether the application was within the period of limitation.

Where in mentioning the particulars of the last prior application its date was wrongly given but the mistake did not affect the merits of the application, it was held that the defect was immaterial, especially if it was amended by the party though two days after the time granted by the Court.³

See also the undermentioned case.⁴

66. Omission to mention costs and interest.—Clauses (g) and (h) of Order 21 Rule 11 sub-rule 2 of the Code of Civil Procedure require that the interest and costs awarded by the decree should be stated in the application for execution. An omission to state these is only an immaterial defect and will not invalidate an application.¹ A contrary view has, however, been taken in the undermentioned cases.²

67. Omission to state mode in which execution is sought.—An execution application which does not specify the manner in

Note 65

- (1926) A I R 1926 Cal 1146 (1147, 1148) 96 Ind Cas 551, *Saudamini Ghose v. Jessore Registered Loan Co., Ltd.*
(1892) 16 Mad 142 (143), *Rama v. Varada*,
(1892) 1892 All W N 114 (114, 115), *Madho Singh v. Ram Bharose Das*.
- (1922) A I R 1922 Sind 29 (31) 15 Sind L R 156 65 Ind Cas 14, *Sahjram Tahilram v. Tower*
- (1901) 23 All 162 (163) 1901 All W N 31, *Kalla Dube v. Bisheshar Patai*.
- (1891) 1891 All W N 154 (155), *Ashraf Begam v. Muhammad Safdar Ali Khan*. (Misdescription of former records referred to in application is not material error.)

Note 66

- (1928) A I R 1928 Mad 440 (444) 112 Ind Cas 90, *Abdul Kharim Sahab v. Lakshmanaswami*
(1926) A I R 1926 Cal 1077 (1081) 53 Cal 664 93 Ind Cas 166, *Pitambar-jana v. Dimodhar Gachait*
(1931) A I R 1931 Oudh 312 (318) 182 Ind Cas 262, *Kishun Dutt v. Chhedi*,
(1922) A I R 1922 Sind 29 (30) 15 Sind L R 156 65 Ind Cas 14, *Sahj-ram Tahilram v. Tower*
(1921) A I R 1921 All 208 (209) 43 All 550 63 Ind Cas 362, *Jamilunnissa Bibi v. Mathura Prasad*.
- (1922) 65 Ind Cas 120 (120) (Pat), *Guru Mahadara Ashram Prasad Sahi v. Mahabir Sukul* (Costs)
(1890) 1890 All W N 93 (93), *Nathu Ram v. Tufail Ahmad*. (Interest.)

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Notes 67-68

which the assistance of the Court is required is not an application in accordance with law.¹ The reason is that it will not be possible in such a case to proceed with the execution. But where, though the mode of assistance sought was not distinctly specified, it was clear from other circumstances what kind of assistance was really sought by the decree-holder, it was held by the High Court of Lahore that the application could not be said to be not in accordance with law.²

68. Failure to file copy of decree.—Sub-rule 3 of Order 21 Rule 11, Civil Procedure Code, provides as follows:—

“The Court to which an application is made under sub-rule 2 may require the applicant to produce a certified copy of the decree.”

The question of the production of the decree thus arises only *after* the application for execution is filed, and, as has been seen in Note 52 *ante*, is not a valid consideration in deciding the question whether the application itself is in accordance with law. It is not imperative that an application for execution should in all cases be accompanied by a copy of the decree.¹ The Court can order the execution to proceed without a copy of the decree being filed.² It has therefore been held in numerous cases that an application not accompanied by a copy of the decree cannot be said to be not in accordance with law,³ and this would be so even if it is dismissed

Note 67

1. (1893) 19 Bom 34 (35), *Sha Karamchand Gokaldas v. Ghelabhai Chakaldas*.
 (1934) A I R 1934 Bom 118 (114) : 150 Ind Cas 866, *Ratanchand v. Chandu Lal*.
 (1925) A I R 1925 Cal 1135 (1136) : 93 Ind Cas 364, *Maharaj Bahadur v. Basiruddin Ahmed*.
 (1875) 7 N W P H C R 79 (81), *W. A. Franks v. Nuneh Mal*.
 (1929) A I R 1929 Nag 148 (150) : 25 Nag L R 94 : 116 Ind Cas 655, *Balaj v. Gopal*.
2. (1932) A I R 1932 Lah 534 (534) : 138 Ind Cas 249 : 14 Lah 6, *Ghanaya Lal v. Punjab National Bank Ltd., Lahore*.

Note 68

1. (1910) 5 Ind Cas 660 (662) (Cal), *Raj Gir Sahay v. Ishwardhar Singh*.
 (1907) 31 Bom 162 (165) : 8 Bom L R 892, *Ramachandra Sadashiv v. Larman Shadashiv*.
2. (1910) 5 Ind Cas 660 (662) (Cal), *Raj Gir Sahay v. Ishwardhar Singh*.
3. (1907) 31 Bom 162 (165) : 8 Bom L R 892, *Ramachandra Sadashiv v. Larman Shadashiv*. (5 Bom L R 394, Not followed, 28 Mad 557, Followed.)
 (1905) 28 Mad 557 (559), *Pachappa Achari v. Poojari Seenan*.
 (1929) A I R 1929 Bom 196 (196) : 117 Ind Cas 526, *Hasan Sahib v. Ramachandra Appayya*.
 (1929) A I R 1929 Mad 440 (442) : 112 Ind Cas 36, *Abdul Kharim Sahib v. Lakshmanaswami*.
 (1918) A I R 1918 All 242 (243) : 40 All 209 : 43 Ind Cas 914, *Raghunandan Lal v. Dadan Singh*.

for non-compliance with the order of the Court requiring the copy to be produced.⁴

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Notes 68-70

69. Failure to produce encumbrance certificate.— Order 21 Rule 106 (Allahabad), Civil Procedure Code, requires an encumbrance certificate to be filed *along* with the application. But it has been held that the non-observance of this requirement will not vitiate the application, which will nevertheless be one in accordance with law.¹ There is no such Rule in Madras where such a certificate is to be filed only *after* an application for execution is filed. The non-production of such certificate will not therefore render the application not one in accordance with law.²

70. Omission to give description of property sought to be proceeded against.— Order 21 Rule 12 of the Civil Procedure Code requires, in an application for execution against *moveable* property belonging to the judgment-debtor but not in his possession, that an *inventory* of the property to be attached should be given. The omission to give such an inventory is a material defect rendering the application not one in accordance with law.¹

Rule 13 of Order 21 provides that an application for the attachment of immovable property belonging to the judgment-debtor shall contain at its foot a description of the property. An application not containing such description has been held to be not in accordance with law.² Where, however, a previous application had given such description and the previous application was referred to in the later application, it was held in the undermentioned case³ that the omission to actually give the description of property in the later application did not render it not one in accordance with law.

(1869) 11 Suth W R 271 (272), *Khettur Mohun Chuttopadhya v. Ishur Chunder Surma*.

4. (1938) A I R 1938 Mad 144 (144) . 175 Ind Cas 827, *Venkatarama Sasiri v. Venkata Narasimham*.

(1918) A I R 1918 Pat 547 (548) . 47 Ind Cas 993, *Arjun Nani v. Lakhan*.

Note 69

1. (1930) A I R 1930 All 188 (189) 122 Ind Cas 179, *Dharamdeo Rai v. Jwala Prasad*.

2. (1918) A I R 1918 Mad 1030 (1032) . 40 Mad 919 : 38 Ind Cas 136, *Natesa Pillai v. Ganapathia Pillai*.

Note 70

1. (1915) A I R 1915 All 320 (321) 29 Ind Cas 479 : 37 All 527, *Abdul Razi Khan v. Maula Bakhsh*.

(1892) 1892 All W N 47 (47), *Lachmi Kuar v. Dal Chand*.

(1892) 1892 All W N 70 (71), *Mangal Sen v. Baldeo Prasad*.

[See however (1894) 1894 All W N 54 (54), *Mahabir Singh v. Saira Bibi*]

2. (1890) 1890 All W N 22 (22), *Ishra v. Serhmal*.

(1931) A I R 1931 Bom 128 (128) 129 Ind Cas 159, *Sakkargauda v. Bhimappa*.

(1892) 1892 All W N 3 (3), *Hira Lal v. Dulari Kuar*.

(1926) A I R 1926 Mad 260 (260) : 92 Ind Cas 109, *Sankaran v. Ambu*. (But if remedied by amendment it, will be one in accordance with law.)

3. (1891) 18 Cal 462 (465), *Wajghan v. Bishwanath Pershad*.

72. Other defects.—The asking of a prayer which is superfluous or which cannot be granted will not render the application invalid.¹ Thus, an application by the transferee of a decree which is in accordance with Order 21 Rule 16, Civil Procedure Code, is not invalidated by the addition of a prayer for the attachment and sale of the judgment-debtor's property without giving an inventory of the property as required by Order 21 Rule 12.² Similarly, an application for execution of a decree, which is final, duly praying for execution thereof, is not invalidated by the addition of a prayer for the passing of a final decree under Order 34 Rule 5 of the Civil Procedure Code.³

The omission to specify the assessment of the land brought to sale is not a material defect vitiating the application.⁴

A applied for execution against the same judgment-debtor in respect of two decrees X and Y. The application was rejected on the ground that it was materially defective as to decree X. It was held that the application must be considered to have been in accordance with law so far as decree X was concerned for the purpose of a subsequent application for execution in respect of decree Y.⁵

An application cannot be considered not to be one in accordance with law because it has been drafted on a flimsy paper.⁶

An omission to pray for notice to be sent under Order 21 Rule 22 of the Code of Civil Procedure is not a material error which would vitiate an application. It is in fact the duty of the Court to issue the notice.⁷

Where the plaintiff obtained a decree under which he was to produce, within a date fixed, a certain amount of money into Court for payment to the defendant, but he applied for execution against the defendant without complying with the condition, and the application was struck off, it was held that this did not render the application one not in accordance with law.⁸

See also the undermentioned cases⁹

Notes 72

1. (1930) A I R 1930 All 225 (244) 52 All 619 : 125 Ind Cas 477 (F B), *Santha Nand Gir v. Basudevanand*.
- (1926) A I R 1926 Pat 160 (161) 90 Ind Cas 847, *Jogendra Prasad Narayan Sinha v. Mangal Prasad Shau* (Decree holder entitled to one third of the decretal amount asking for execution of the whole decree.)
- (1924) A I R 1924 Pat 471 (473) 8 Pat 42 : 75 Ind Cas 312, *Kishore Mal v. Jagdish Narain*.
2. (1890) 1890 All W N 245 (246), *Hayat Ali v. Rup Chand*.
3. (1937) A I R 1937 Lah 401 (406) 173 Ind Cas 185, *Jodh Singh v. Bhagwan Das Nana Chaud*.
4. (1918) A I R 1918 Mad 1090 (1092) 40 Mad 949. 38 Ind Cas 136, *Natesa Pillai v. Ganapathia Pillai*.
5. (1936) A I R 1936 All 467 (468) 163 Ind Cas 841, *Mohammad Shakir Dad Khan v. Sahu Nand Kishore*.
6. (1909) 4 Ind Cas 1154 (1155) 3 Sind L R 171, *People's Bank of India v. Mahomed Ali*.
7. (1909) 2 Ind Cas 941 (942, 943) (Cal), *E. H. Stevens v. Kamta Pershad*.
8. (1924) A I R 1924 Bom 64 (64), *Mahomed Shidick v. Mahomed Hassan*.
9. (1933) A I R 1933 Rang 87 (88, 89) 142 Ind Cas 435, *Kadiresan Chettiyar v. Maung San Ya*. (Omission to state form of notice is a formal defect.)

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(Clause 5)
Note 73

73. Application valid only if made by decree-holder or his representative.—Section 51 of the Code of Civil Procedure provides that, subject to such conditions and limitations as may be prescribed, the Court may, *on the application of the decree-holder*, order execution of the decree. Section 146 of the same Code provides that, save as otherwise provided by the said Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

It follows that an application for execution can be made only by

1. the decree-holder¹ or
2. his representative.^{1a}

The decree-holder *on record* is entitled to apply for execution² and his application would be in accordance with law even if his interest in the decree has been transferred to another,³ and even if another person who is a joint decree-holder with him is not made a party.^{3a} A defendant in a partition suit in which a decree has

(1909) 1 Ind Cas 240 (242) : 5 Nag L R 8, *Vithal v. Gopal Rao*. (Omission to specify the Court which passed the decree sought to be executed.)

(1916) A I R 1916 Lah 316 (316) : 34 Ind Cas 955, *Baldeo Sahai v. Kanhaiyalal*.

(1901) 4 Oudh Cas 333 (338), *Ujagar Lal v. Shankar Dayal*. (Where an application is made to execute the original decree and afterwards that decree is confirmed in appeal, and a fresh application is made to

Note 73

1. (1920) A I R 1920 Lah 443 (446) : 52 Ind Cas 356, *Ram Rattan v. Datar Kaur*.

(1875) 24 Suth W R 10 (11), *Duriao Roy v. Doolla Roy*. (Application by person not then a decree-holder on the record, is not an application for execution.)

1a (1907) 31 Mad 77 (79, 80) : 17 Mad L Jour 506, *Alayirisamy Naidu v. Venkatachellapathy Ayyar*.

2. (1917) A I R 1917 Oudh 182 (185) : 37 Ind Cas 133, *Dil Akha Begam v. Deputy Commissioner, Bahraich*.

3. (1913) 18 Ind Cas 97 (93) : 16 Oudh Cas 70, *Ejaz Hussain v. Shah Zaman Mirza*.

(1935) A I R 1935 Mad 883 (384, 385) : 159 Ind Cas 589, *Jayanarayana v. Polayya*.

(1934) 67 Mad L Jour 63 (64) (S N).

(1934) A I R 1934 Pesh 40 (43) : 152 Ind Cas 443, *Ahmad Ali v. Mt. Fatima Sultan*.

(1917) A I R 1917 Mad 691 (692) : 34 Ind Cas 791, *Ara Chetty v. Teerthamalai Chetty*.

[See also (1929) A I R 1929 Bom 279 (283) : 118 Ind Cas 694, *Nadirshah Jamshedji v. Purshottamdas Ganpaldas*]

3a (1934) A I R 1934 Bom 216 (218) : 54 Bom 429 : 153 Ind Cas 176, *Bahamidy v. Abdul Karim* (A I R 1931 Lah 600, Followed.)

(1927) A I R 1927 Lah 106 (107) : 100 Ind Cas 475, *Amin Chand v. Khuli*.

(1920) A I R 1920 Nag 40 (41) : 54 Ind Cas 921, *Amir Ali v. Gopaldas*.

[See also (1909) 5 Ind Cas 120 (120) (Mad), *Yasha Kuthiyalath v. Aishi Kalathath* (Other decree-holders were made party respondents.)

been passed is in the position of a decree-holder and will be entitled to apply for execution.⁴ A joint Hindu family consisted of a father and his sons. Partition was effected by metes and bounds between them by a decree passed on an award. The father subsequently obtained a decree against a stranger in respect of a joint family debt. Subsequently, one of the sons applied for execution of the latter decree. It was held by the Patna High Court that the son was a person interested in and was the holder of the decree sought to be executed and that his application for execution was in accordance with law.⁵

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Notes 73-74a**

As to applications by representatives, see Notes 74 to 80 *infra*.

74. Application by attaching creditor. — Sub-rule 3 of Order 21 Rule 53 of the Code of Civil Procedure provides that the holder of a decree sought to be executed by the attachment of another decree, shall be *deemed to be the representative* of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.¹ An application by the attaching decree-holder to execute the attached decree would therefore be one in accordance with law.

74a. Application by decree-holder of attached decree or his transferee. — Under the Civil Procedure Code, 1882, it was held in some cases that after attachment of the decree the decree-holder could not apply for execution and that such an application was not in accordance with law,¹ while a contrary view was taken in other cases.^{1a} The addition of the words "or his judgment-debtor" in sub-rule 1, clause (b) of Order 21 Rule 53 of the present Code now makes it clear that the decree holder of the decree attached is not prevented from applying for execution thereof. An application by the decree-holder of the attached decree would therefore be one in

(1933) A I R 1933 Lah 655 (656) 14 Lah 212 189 Ind Cas 151,
Nasiruddin v. Dost Mohammad }

But an order that such an application is not competent is a finding that it is not in accordance with law

(1921) A I R 1921 Sind 18 (14) 62 Ind Cas 507 15 Sind L R 11, *Ibrahim v. Firm of Gulam Hussain*

4. (1923) A I R 1923 Bom 23 (23) 46 Bom 937 67 Ind Cas 417, *Chunnilal Jannadas v. Mulchand Harjandas*

(1924) A I R 1924 P C 198 (198) 4 Pat 61 51 Ind App 321 81 Ind Cas 747 (P C), *Lachmi Narayan Marwary v. Balmakund Marwary*

5 (1937) A I R 1937 Pat 607 (609) 172 Ind Cas 100, *Akhori Ramcharan Prasad v. Saran Singh*.

Note 74

1. (1888) 15 Cal 371 (375, 376), *Peary Mohun Chowdhry v. Romesh Chunder Nundy*

(1892) 16 Mad 20 (22), *Shah Man Mull v. Kanagasabapathi*

Note 74a

1 See (1911) 9 Ind Cas 786 (787) 35 Mad 622, *Thuchaloul Unni Keyal v. Arappail Pathullu* (7 Bom 459 27 All 119, 33 Cal 867, Followed.)

1a (1903) 13 Mid L Jour 10 (10) (N R C)

(1903) 13 Mid L Jour 265 (265), *Patamma v. Ideti Deary*.

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accordance with law if it is otherwise in accordance with law.²

The question has arisen whether a *transferee* of the attached decree can apply for execution under Order 21 Rule 53 of the Code. According to the High Courts of Madras,³ and Rangoon,⁴ and the Judicial Commissioner's Court of Nagpur,⁵ a transferee *prior to attachment* can apply. The High Court of Patna⁶ has held that even a transferee *after attachment* is entitled to apply for execution by virtue of Order 21 Rule 16 of the Code. In all such cases the application would be in accordance with law.

75. Application by Court-of-Wards.—Where a decree is passed in favour of an estate under the management of the Court of Wards, the Court of Wards, as representing the estate, is the proper person to take out execution of the decree.¹

76. Application by person represented in representative suits.—In the case of representative suits, a person not on the record but who was represented in the suit by the decree-holder on record, can apply to be brought on the record and to execute the decree.¹

77. Application by stranger claiming to be representative.—*B* and *R* were rival claimants to the interest of the deceased decree-holder. *B* filed an execution application on 5th May 1930. In a suit filed by *R*, it was held that *R* was the person entitled to execute the decree and not *B*. *R* then filed an application within three years of *B*'s application but beyond three years of the decree. It was held that *B*'s application was not one in accordance with

2. (1912) 13 Ind Cas 179 (180) (Mad), *Gopala Menon v. Manavikraman*.

3. (1912) 17 Ind Cas 323 (325) (Mad), *Arumugha Mudaliar v. Yagamba Bas Ammani*.

[See also (1910) 5 Ind Cas 92 (94) (Mad), *Venkatrama Iyer v. Esumsa Rowthen*.]

[But see (1912) 18 Ind Cas 659 (660) (Mad), *Thiruvengadam Pellai v. Doridla Subbiah*.

(1910) 5 Ind Cas 1010 (1010) (Mad), *Musala Reddi v. Ramaiya*.

(1909) 3 Ind Cas 938 (939) (Mad), *Sadagopachariar v. Raghunada-chariur*.]

4. (1928) A I R 1928 Rang 25 (26) : 5 Rang 595 : 106 Ind Cas 853, *Co-operative Town Bank of Padigan v. Raman Chettyar*.

5. (1927) A I R 1927 Nag 182 (193) : 23 Nag L R 20 : 99 Ind Cas 635, *Atmaram v. Ganpati*.

6. (1929) A I R 1929 Pat 1 (3) : 7 Pat 726 : 113 Ind Cas 673, *Harariram v. Kedar Nath Marwari*.

Note 75

1. (1918) A I R 1918 Pat 216 (217) : 49 Ind Cas 701, *Chandrika Prasad Singh v. Kesho Prasad Singh*.

Note 76

1. See (1923) A I R 1923 Mad 472 (473) : 72 Ind Cas 294, *Swaminatha Mudaliar v. Kumarasami Chettyar*.

law and *R*'s application was barred by limitation.¹ See also the undermentioned case.²

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(Clause 5)
Notes 77-78

78. Application by transferee of decree.—The transferee of a decree is a representative of the decree-holder and would, under Section 146 of the Code of Civil Procedure, be entitled to apply for execution.¹ That provision should, however, be read subject to the other provisions of the Code one of which is Order 21 Rule 16, which provides that a transferee in *writing or by operation of law* may apply for execution in the same manner as the decree-holder himself.² An application by a person in whose favour there has been an oral assignment of the decree cannot, therefore, be said to be in accordance with law.³ Where an assignment is refused to be recognized by the Court as being a colourable one, the application by the assignee for execution is not one in accordance with law.⁴ But except in such a case as the last mentioned one, an application by a transferee *claiming to be such* would be one in accordance with law, even though the assignment is not proved or recognized⁵ and even

Note 77

1. (1938) A I R 1938 Pat 531 (532) : 178 Ind Cas 759, *Achutanand Giri v Saran Singh*
 2. (1917) A I R 1917 Mad 2 (3) : 37 Ind Cas 750, *Saminatha Asari v. Gopala-*
- judgment debtor.)

Note 78

1. (1909) 2 Ind Cas 493 (434) (Mad), *Venatasubbiah v. Dade Sahib*.
2. (1929) A I R 1929 Mad 252 (256) : 52 Mad 590 : 118 Ind Cas 775, *Palaniappa Chettiar v Valhammai Achi* (Court recognizing assignment of decree and allowing assignee to execute gives fresh start of limitation)
- (1894) 16 All 483 (492) : 1894 All W N 181, *Badri Narain v Jas Kishen Das*
- (1911) 9 Ind Cas 349 (350) (Bom), *Salehhan v Viswanath*.
- (1909) 5 Ind Cas 120 (120) (Mad), *Vasha Kuthiyalath v Ashi Kalalath*
- (1937) A I R 1937 Bom 365 (370) : 170 Ind Cas 877 : I L R (1937) Bom 691, *In re Janki Prasad Poddar*.
- (1902) 26 Mad 258 (259), *Chathoth Kunhi Pakki v. Sandindatide Kunhamnad*
- (1934) A I R 1934 Bom 216 (218, 219) : 58 Bom 428 : 153 Ind Cas 176, *Babamya v Abdul Karim*.
- (1899) 1899 All W N 16 (16), *Imdad Hussain v Lalta Prasad* (An application for execution of a decree made by a transferee under Section 232 of the Code of Civil Procedure, 1892, though unsuccessful, is a step-in-aid of execution)
3. (1912) 16 Ind Cas 607 (607) (Mad), *Ramanathan Chettiar v. Raghatendra Row*
- (1912) 13 Ind Cas 78 (79) (Mad), *Ramanathan Chettiar v Subbanatha Gounden*.
4. (1907) 1907 All W N 39 (39), *Intillab Hussain v Rafunnissa*
5. (1938) A I R 1938 Bom 809 (311) : 176 Ind Cas 152, *Dayalshai v Dayalshai*, (1909) 4 Ind Cas 582 (582) : 31 Bom 68 *Vinayak Vaman v. Ananda Ramji*.

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(Clause 5)
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though the assignment is, in subsequent proceedings, found to be invalid.⁶

Where a transfer of a decree has to be *registered* under the law in order to pass a title, an application by the transferee under an unregistered transfer cannot be considered to be one in accordance with law.⁷ Where, however, in such a case the application is made both by the decree-holder and the transferee, the application would be one which will save time for a later execution petition by the transferee who has obtained a second assignment of the decree and got it duly registered.⁸ In the undermentioned case,⁹ where the transferee of the decree under an unregistered transfer made his application, but subsequently got the assignment registered within the time prescribed by the Registration Act, it was held that the registration would date back to the date of the execution and that the application made by him must be considered as one in accordance with law.

There is a conflict of opinion on the question whether an application by the transferee of the decree *merely* for his being recognized as a transferee without any prayer for execution is one in accordance with law. According to one view, there is no provision in the Civil Procedure Code enabling the transferee to make such an application, that such an application is therefore legally incompetent, and is not in accordance with law either as an application for execution or as an application to take a step-in-aid of execution.¹⁰ A contrary view, namely, that it will be in accordance with law to take a step-in-aid of execution, has been taken in the undermentioned cases.¹¹

6. (1910) 5 Ind Cas 120 (120) (Mad), *Vasha Kuthiyalath v. Ashi Kalalath*.
 (1902) 12 Mad L Jour 348 (349), *Sreepada Brahmayya Pantulu v. Parasuramayya*.
 (1924) A I R 1924 Mad 673 (675) : 47 Mad 641 : 80 Ind Cas 103, *Rajalagurupathy v. Bhatani Sankaran*.
 (But see (1918) A I R 1918 Mad 1204 (1204) : 89 Ind Cas 950, *Kailasa Pandaram v. Ramanuja Naidu*)
7. (1927) A I R 1927 Mad 264 (264), *Lakshmana Pattar v. Suppayya Pandaram*.
8. (1927) A I R 1927 Mad 264 (264), *Lakshmana Pattar v. Suppayya Pandaram*.
9. (1890) 18 All 89 (92) . 1890 All W N 186, *Abdul Majid v. Muhammad Farullah*.
10. (1935) A I R 1935 Sind 26 (26) : 159 Ind Cas 807, *Mt. Memoo Mahomed Ismail v. Mahomed Sidik Pir Mahomed*. (A I R 1933 Sind 341, Followed.)
 (1933) A I R 1933 Sind 341 (341) : 27 Sind L R 314 : 147 Ind Cas 470, *Deeraj Multani Sahai v. Fateh Chand Ram Chand*.
 (1937) A I R 1937 Bom 365 (367) : 170 Ind Cas 877 : I L R (1937) Bom 691, *In Re Janki Prasad Poddar*.
 Chetty.
 am v.
 (1925) A I R 1925 Nag 362 (363) : 68 Ind Cas 112, *Jagannath v. Shrinivas*.
 (1907) 29 All 301 (302) : 4 All L Jour 184 : 1907 All W N 74, *Pitani Singh v. Tota Singh*.
 (1908) 31 Mad 234 (235) : 4 Mad L Tim 72 : 18 Mad L Jour 24, *Annamalai Mudaliar v. Ramaier*.

The fact that the transferee is a *benamidar* for another person will not prevent the application from being one in accordance with law, for the purpose of a subsequent application by the true transferee.¹²

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N obtained a transfer of a decree from the heir of the deceased decree-holder and made several applications for execution. *G* purporting to be a legatee of the deceased decree-holder sued *N* and obtained a decree that he was entitled to the decree amount. Then he applied for execution and claimed the applications of *N* as giving him starting points of limitation. It was held by the High Court of Madras that *N*'s applications were in accordance with law as, at the time they were made, *N* was the only person who was, on the face of the decree, entitled to execute it, and that the executing Court had no concern with the rights of any person other than the person appearing on the face of the decree as the decree-holder.¹³

H obtained a decree in his favour as the manager of a joint Hindu family consisting of himself and his sons. *H* took out execution and recovered a portion of the decree amount, and then disappeared. *N*, a son of *H*, applied for execution subsequently alleging that after the disappearance of *H*, he was the manager of the family. It was held that as manager of the family he was entitled to execute the decree without any question of assignment of the decree, that even otherwise *N* may be considered to be a transferee by operation of law of the decree from *H*, and that therefore his application was one in accordance with law.¹⁴

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- (1938) A I R 1938 Nag 191 (192) 174 Ind Cas 243, *Tanba Yadora v. Chandrashankar Balkrishnappa*.
 (1933) A I R 1933 Rang 55 (56) 144 Ind Cas 310, *Moidoo v. Mahomed*
 12 (1907) 10 Oudh Cas 263 (267), *Abdul Wahid Khan v. Nawab Bagar Ali Khan*
 (1892) 20 Cal 388 (395), *Balkishen Das v. Dedmat Koer*.
 (1927) A I R 1927 Lah 110 (110) 8 Lah 35 100 Ind Cas 545, *Gurdial Singh v. Gurbakhsh Singh*.
 (1925) A I R 1925 Mad 701 (701, 702) 49 Mad 553 68 Ind Cas 409, *Palanappa Chetty v. Subramania Chettiar*.
 (1915) A I R 1915 All 264 (264) 37 All 414 29 Ind Cas 593, *Kamta Prasad v. Indomati*.
 (1938) A I R 1938 Pat 457 (459) 17 Pat 223 177 Ind Cas 992, *Mohammad Anas v. Bhupendra Prasad*.
 (1890) 6 Mad L Jour 31 (32), *Arasappan v. Pulugasary*.
 (1870) 4 Beng L R App 40 (40), *Purnachandra Roy v. Abhaya Chandra Roy*.
 (1935) 39 Cal W N 1073 (1074), *Tahir Ali v. Abdul Goni*.
 [But see (1914) 25 Ind Cas 555 (556) (Cal), *Ramlal Pahari v. Babulal Bansi*.
 (1882) 9 Cal 633 (634) 12 Cal L R 146, *Denonath Chuckerbutty v. Lalit Coomar Gangopadhyay*.
 (1889) 16 Cal 355 (362) 19 Ind Jur 381, *Gour Sundar Lahiri v. Hem Chunder Choudhry*.]
 13 (1920) A I R 1920 Mad 135 (135) 43 Mad 424 57 Ind Cas 753, *Hari Krishnamurthi v. Suryanarayanamurthi*.
 14 (1938) A I R 1938 All 256 (258, 259) I L R (1938) All 425 175 Ind Cas 590, *Narain Sarup v. Daya Shanker*.

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A person who has only a right against the decree-holder to obtain an assignment of the decree from him, but who has actually got no assignment, is not entitled to apply for execution and his application would not be one in accordance with law.¹⁵

Where a decree is transferred to another Court for execution, an application by the assignee to that Court requesting it to send back the records of the case to the Court which passed the decree "for the purpose of further conducting the suit" is a step-in-aid of execution.¹⁶ The reason is that his claim as assignee can be recognized only by the Court which passed the decree and for that purpose it is necessary to send back the records to that Court.¹⁷

79. Application by agent. — Order 3 Rule 1 of the Civil Procedure Code provides that an application required or authorized to be made or done by a party in Court may, except where otherwise expressly provided by any law for the time being in force, be made by the party in person or by his *recognized agent* or by a *pleader* on his behalf. Rule 2 of the same Order states who are to be considered recognized agents for such purposes. A person so authorized to act for the person entitled to execute the decree can apply for execution, and if such application is made by him, it would be one in accordance with law.¹

The mere fact that the authorization such as the power of attorney is not filed in Court along with the application for execution does not vitiate the application.² Nor will immaterial defects in the power of attorney render the application not one in accordance with law.^{2a}

In *Chhajju v. Lehna*,³ where an application was presented by a person who had no power of attorney from the decree-holder, and, on objection being raised, obtained a power of attorney and filed it in Court within the period of limitation, it was held that there was then a proper application before the Court on which the Court could

15. (1925) A I R 1925 Bom 472 (472) : 90 Ind Cas 561, *Pandujoti v. Sarla Piraji*.

(1916) A I R 1916 P C 147 (147, 148) : 43 Cal 990 : 43 Ind App 108 : 31 Ind Cas 69 (P C), *Jatindra Nath Dasu v. Peyer Deye Debi*.

16. (1926) A I R 1926 Mad 431 (432) : 92 Ind Cas 770, *Ayyaru Pillai v. Varadh-raya Pillai*.

17. (1926) A I R 1926 Mad 431 (432) : 92 Ind Cas 770, *Ayyaru Pillai v. Varadh-raya Pillai*.

Note 79

1 (1916) A I R 1916 Mad 601 (603) : 18 Ind Cas 135 : 33 Mad 131, *Venkata-ramana Aiyer v. Narasinga Row*.

2. (1927) 52 Mad L Jour 23 (23) (N N C)
 (1913) 18 Ind Cas 526 (526, 527) : 1912 Pun Re No. 119, *Ganga Ram v. Dina Nath*.

2a. (1914) 1914 Mad W N 43 (13) (S N).

(1914) A I R 1914 Mad 632 (633) : 23 Ind Cas 99, *Srinivasa Iyengar v. Thirumalai Chetty*.

3. (1929) A I R 1929 Lah 478 (479) : 113 Ind Cas 781.

act. Where *A*, a decree-holder, attained majority on 17th July 1925, and on 10th December 1925 one *X* applied on *A*'s behalf for execution of the decree, without any power of attorney from *X* but *A* ratified *X*'s act within three years of his attaining majority, it was held that the ratification rendered the application valid with effect from the date of the ratification.⁴

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Where an agent held a power of attorney under two joint decree-holders, and he applied for execution not knowing that one of the decree-holders was dead at the time of the application, it was held that it was an application in accordance with law.⁵

Under the old Civil Procedure Code, Sections 36 and 37, it was held that where the decree-holder at the time of the application was resident within the local limits of the Court, an application presented by his agent even though properly armed with the power of attorney was not in accordance with law.⁶ This, however, is no longer law in view of the present Rules 1 and 2 of Order 3 of the Code.⁷

80. Application by pleader. — See Note 71 *ante*.

81. Application by executor of decree-holder without probate. — It was held in the undermentioned case that an application for execution by the executors of the original decree-holder, if in proper form, is a step-in-aid of execution even though probate was not obtained at the date of the application.¹ In support of this view the decision in *Hafizuddin Chowdhry v. Abdul Aziz*,² which held that the omission to produce a *succession certificate* did not render the application by the heirs ineffectual, was relied upon.

81a. Previous application for execution need not be against the same person or property or for the same relief. — Where the decree grants a *single relief*, piecemeal execution thereof will not be permitted.³ But, where the decree grants different reliefs or grants relief against different persons jointly, the application for execution in respect of one or more of such reliefs or against one or more of such

4. (1931) A I R 1931 Lah 600 (601) 135 Ind Cas 207, *Ghanaya Lal v. Madho Prashad*

(1930) A I R 1930 Lah 603 (604), *Madho Prashad v. Ghanaya Lal*

5. (1893) 13 Cal L R 18 (22), *Amirunnissa Choudhrani v. Ahsanulla Choudhri*.

6. (1901) 22 All 499 (500, 501) 1901 All W N 161, *Murari Lal v. Umrao Singh*.

7. See Order 3 Rule 2, Note 2, Point (1) of the Authors' Civil Procedure Code

Note 81

1. (1909) 4 Ind Cas 118 (118) (Cal), *Hari Badam Das v. Gobinda Chandra Das*

2. (1893) 20 Cal 755 (757)

Note 81a

1. (1933) A I R 1933 Bom 364 (366) 57 Bom 488 146 Ind Cas 243, *Panaji Girdhar Lal v. Ratanchand Hajarimal*.

(1913) 19 Ind Cas 304 (304) 35 All 204, *Ram Chander Nath Kalra v. Abdul Hakim*

(1879) 19 Suth W R 417 (418), *Romanarath Jha v. Roy Luchmeeput Singh Bahadur*.

(1935) A I R 1935 Cal 114 (119) 154 Ind Cas 634, *Kusuri Kamini Deka v. Saulesh Chandra Chakravarty*.

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persons, will be in accordance with law and will save time for a subsequent application in respect of *any* relief granted by the decree and against *all* the judgment-debtors.² It is not necessary that, in order to save limitation, the application should have been directed to the same property which is the subject-matter of the subsequent application or to the same person against whom proceedings are sought to be taken in the subsequent application. Thus, an execution application against the principal debtor has been held to save limitation against the surety.³

On the same principle, execution by the *arrest* of the judgment-debtor will save time for a subsequent application for execution by sale of the property of the judgment-debtor. Conversely, an application for execution by attachment and sale of some of the properties of the judgment-debtor will save time for a subsequent application for proceeding against his *other* properties or against his person.⁴

82. Application against legal representative of judgment-debtor. — The Civil Procedure Code does not contemplate any specific application to bring on record the legal representative of the judgment-debtor, though, in practice, it is usual to add a prayer to that effect. The omission, therefore, of an express prayer to bring the legal representatives on record will not render the application against the legal representatives one not in accordance with law.¹

2 (1893) 19 All 93 (100) 1893 All W N 57 (F B), *Sadho Saran v. Hol Pande*.

(1897) 1897 All W N 31 (31), *Bhikshari Lal v. Ali Mardan Khan*.

(1867) 8 Suth W R 99 (100), *Burodahani Roy v. Ram Kishore Dutt*.

(1891) 18 Cal 515 (517), *Radha Kishen Lal v. Radha Pershad Singh*.

(1875) 7 N W P H C R 95 (96, 97), *Ram Baksh Singh v. Madat Ali*.

(1915) A I R 1915 Mad 811 (812) : 21 Ind Cas 32 : 33 Mad 199, *Balasubramania Chetty v. Swaranammal*.

(1926) A I R 1926 Nag 153 (160) : 89 Ind Cas 135 : 21 Nag L R 143, *Jairam v. Adlu*.

(1890) 15 Bom 242 (244), *Dalchand Bhudar v. Bai Shikhar*.

(1926) A I R 1926 Cal 1019 (1021) : 53 Cal 582 : 96 Ind Cas 562, *Upendra Nath Bose v. K. P. Dutt*.

(1899) 26 Cal 883 (890), *Nepal Chandra Sadoo Khan v. Amrita Lal Saib Khan*.

(1888) 1888 All W N 95 (96), *Narain v. Gokal*.

(1867) 8 Suth W R 274 (274), *Jayesh Prokash Gangooly v. Kalle Coomiar Roy*.

(1922) A I R 1922 All 383 (389) : 44 All 166 : 65 Ind Cas 358, *Ravi Bruckh Roy v. Deoo Tiwari*.

(1866) 5 Suth W R (Misc) 40 (41), *Ospendur Mohun Mustafee v. Tripp*.

(1922) A I R 1922 Bom 194 (195) 67 Ind Cas 169 : 46 Bom 719, *Siddhant Zulkappa v. Keshavrao Parattrao*.

3 (1923) A I R 1923 All 384 (385) : 74 Ind Cas 1014, *Gopinath Shukul v. Sat Narain Shukul*.

4 (1877) 2 Bom 294 (294), *Jamnadas v. Lalitarani*.

Note 82

1 (1935) A I R 1935 Mad 563 (568, 569) : 143 Ind Cas 844, *Thirupathi Srinagar v. Yegannammal*. (1900-) 31 Mad 77 : A I R 1925 Mad 701 : A I R 1932 Mad 73 : A I R 1931 Mad 303, *Relied on*

There is a difference of opinion as to whether a proceeding taken against a *wrong* person as the legal representative of the judgment-debtor is one in accordance with law which will give a fresh starting point for a subsequent application against the proper representatives. It has been generally held that such an application, if made *bona fide*, is a good application and that even if it is not a proper application for execution, it would still be a valid application to take a step-in-aid of execution^{1a}. A contrary view has been held in the undermentioned case.² In view of the clear pronouncement of their Lordships of the Privy Council in *Khalil Ur Rahman v. Collector of Etah*,³ that the question of bona fides of the decree-holder is not a material consideration in deciding the question whether an application is in accordance with law, it seems doubtful whether the first of the two views stated above is not open to reconsideration. Where there are two *rival claimants* to the estate of the judgment-debtor, each claiming to be the true representative, and the decree-holder in good faith chooses one of them and proceeds against him, it has been held that the person chosen would be deemed to represent the estate, and the application against him would thus be regarded as being one in accordance with law.⁴

As to the validity of applications for the arrest and detention of the legal representatives in execution of the decree against the deceased judgment-debtor, see Note 57 *ante*.

83. Application where judgment-debtor is a minor.—Where a decree was obtained against a minor *A* represented by his mother *B* as guardian ad litem, and an application for execution of the decree was made against *B* herself and not as guardian of *A*, and the application was granted and certain property of the minor *A* was attached, it was held that the application could not, by reason only of the said mistake, be regarded as one not in accordance with law.¹ See also the undermentioned case.²

1a (1935) A I R 1935 Mad 161 (162) 155 Ind Cas 327, *Subramania Denka Gnanasambanda Pandara Sannadhi v. Rangaswami Chettiar*

(1938) 40 Pun L R 25 (26), *Mt. Harbanso v. Munshi Ram*.

(1892) 1892 All W N 241 (242), *Gopal v. Har Prasad*.

(1927) A I R 1927 Pat 92 (93) 99 Ind Cas 501, *Ganeshwar Singh v. Than Mal*.

(1932) A I R 1932 Pat 306 (307) 11 Pat 503 139 Ind Cas 840, *Brajasunder Das v. Radha Prasad Bhagat*.

(1926) A I R 1926 Lah 84 (35) 90 Ind Cas 1050, *Mt. Begam Dabi v. Bulaqi Shah*.

(1908) 35 Cal 1047 (1049) *Bipin Behari Mitter v. Bibi Zohra*.

(1892) 20 Cal 848 (896), *Balishen Das v. Radmati Koer*.

2. (1910) 6 Ind Cas 38 (40) 32 All 404, *Gyanendranath Dasu v. Rani Nishala Bibi*.

3. (1934) A I R 1934 P C 14 (16) 61 Ind App 62 147 Ind Cas 323 55 All 993 (P C).

4. (1909) 4 Ind Cas 1059 (1060) 33 Mad 6, *Ramaswamy Chettiar v. Oppala-manai Chetti*.

Note 83

1. (1887) 12 Bom 427 (430), *Hari v. Narayan*.

2. (1918) A I R 1918 All 289 (289) 43 Ind Cas 519, *Ram Lakhon Das v. Shankar Singh*.

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Where an application for execution prayed for the attachment and sale of the minor judgment-debtor's property but it was subsequently found that the guardian ad litem was dead at the date of the application, it was held that the irregularity was not material and that the application should be considered to be in accordance with law.³

84. Application against trustee judgment-debtor who has ceased to be trustee subsequently. — Where a decree was obtained against A as trustee, but subsequently A was removed from the trusteeship, and the decree-holder, not knowing the fact of such removal, applied for execution against A, it was held that the application must be considered to be one in accordance with law in the absence of proof that at the date of the application, A had been removed from the trusteeship.¹

85. Application against judgment-debtor who was dead at that date. — There is a difference of opinion as to whether an application for execution against a judgment-debtor who is dead at the time the application is made can be considered to be one in accordance with law. On the one hand, it has been held that a *bona fide* application of that kind would give a fresh starting point of time.¹ On the other hand, a contrary view has been taken, namely, that such an application cannot be considered to be one in accordance with law.² In *Mt. Ram Kali v. Bir Bhadarman*,³ it was held by

3. (1931) A I R 1931 Lah 636 (637) : 131 Ind Cas 1107, *Ghulam Hussain v. Narain Singh*.

(1933) A I R 1933 Mad 696 (697) : 145 Ind Cas 714, *Jagannatha Rao v. Narayanamurti*.

(1924) A I R 1924 Pat 333 (334) : 72 Ind Cas 1003, *Puran Mall v. Mt. Dilwa*.

(1936) A I R 1936 Nag 77 (78), *Pralhad v. Mohanlal*.

Note 84

1 (1926) A I R 1926 Mad 321 (322) : 92 Ind Cas 709, *Trustees, Parakkat Devaswom v. Venkatachalam Vadhyar*.

Note 85

1. (1893) 17 Mad 76 (79) : 4 Mad L Jour 8, *Samia Pillai v. Chockalinga*.

(1935) A I R 1935 Mad 161 (162) : 155 Ind Cas 327, *Gnanasambanda Pandara Sannadhi v. Rangaswami Chelliar*.

(1932) A I R 1932 Pat 222 (224) : 11 Pat 546 : 133 Ind Cas 91, *Sheojobind Ram v. Mt. Kishunbansi Kuer*.

(1924) A I R 1924 Pat 333 (334) : 72 Ind Cas 1003, *Puran Mall v. Mt. Dilwa*.

(1926) A I R 1926 Mad 321 (322) : 92 Ind Cas 709, *Parakkat Devaswom v. Venkatachalam*.

(1908) 35 Cal 1047 (1049), *Dipin Behari Mitter v. Bibi Zohra*.

(1934) A I R 1934 Lah 55 (55) : 154 Ind Cas 307, *Maula Dakhsh v. Mohamad Ikram*.

2. (1934) A I R 1934 All 463 (464) : 149 Ind Cas 1131 : 56 All 463, *Mt. Ram Kali v. Bir Bhadarman Tewari*.

(1934) A I R 1934 Bom 215 (216) : 153 Ind Cas 181, *Manjula Bai Kashinath v. Pandurang Jayaram*.

(1903) 13 Mad L Jour 37 (37) (N R C).

(1897) 7 Mad L Jour 310 (310) (N I C). (Critical Note on (1897) 19 All 337 : 1897 All W N 75, *Madho Prasad v. Kesho Prasad*)

(1897) 19 All 337 (239) : 1897 All W N 75, *Madho Prasad v. Kesho Prasad*.

3. (1934) A I R 1934 All 463 (464) : 56 All 463 : 149 Ind Cas 1131.

the High Court of Allahabad that an application for *execution* against a judgment-debtor who is dead would not be in accordance with law, but that an application for *transfer of the decree* to another Court for execution would be a valid step-in-aid of execution. In *Manjula-bai Kashinath v. Pandurang Jayaram*,⁴ the High Court of Bombay held that an application against a deceased judgment-debtor, *whether for execution or for a step-in-aid of execution*, would be not in accordance with law. The same High Court held in a later case^{4a} that an application for transfer of the decree for execution in ignorance of the death of the judgment-debtor, would be a valid step-in-aid of execution. The reasoning of the decisions holding that such applications are in accordance with law is not clear. In *Abdus Sattar v. Mohini Mohun*,⁵ it was observed that the rule that when a suit is filed against a dead person it is a nullity, did not apply to execution proceedings. If the principle is that a proceeding against a non-existing person is a nullity, it is difficult to see why execution proceedings should be excepted from the operation of the rule.

86. Application, if need be bona fide.—Section 20 of the Act of 1859 provided that no process of execution should issue to enforce any judgment, decree or order unless the application for execution was made within three years of "some proceeding" to enforce such judgment, decree or order, or to keep the same in force. It was held in cases under that Act that the words "some proceeding" meant some *bona fide* proceeding. The Courts were therefore held bound to decide in each case whether the previous application was a *bona fide* one or was merely a colourable one.¹

4 (1934) A I R 1934 Bom 215 (216) 153 Ind Cas 181.

4a (1934) A I R 1934 Bom 266 (270) 151 Ind Cas 767, *Gopal Shankar v. Raising Premji*.

5 (1933) A I R 1933 Cal 684 (687) 149 Ind Cas 1024

Note 86

1. (1870) 13 Moo Ind App 479 (488) 5 Beng L R 611 14 Suth W R 21 : 2 N W P H C R 402 2 Suther 351 2 Str 597 (P C), *Maharajah Dheraj Mahtab Chund Bahadoor v. Bulram Singh*.

(1872) 18 Suth W R 76 (77) . 11 Beng L R 23 (P C), *Roy Dhunput Singh v. Madhomotee Dabla*

(1874) 21 Suth W R 97 (100) 13 Beng L R 169 (P C), *Benaleram Seem v. Brojendra Narain Roy*.

(1869) 2 Beng L R App 24 (25), *Gholam Ashgar v. Lakhmani Dabla*

(1869) 2 Beng L R App 45 (46), *Ganga Narayan Choudhry v. Mohammad Sirkar*.

(1869) 3 Beng L R App 142 (143), *Adina Bibi v. Sububunnissa Bibi*

(1871) 6 Beng L R App 146 (146, 147), *Maharaja Dhuraj Mahtab Chand Bahadur v. Lakhmi Bibi*.

(1866) 6 Suth W R Misc 76 (77), *Maharajah Indurjeet Koonoor v. Mazim Ali Khan*

(1866) 6 Suth W R Misc 91 (92), *Tiluck Chunder Gooho v. Gourmonee Debee*

(1866) 6 Suth W R Misc 97 (97) *Bhugobutty v. Mohun Chunder Puteedundo*

(1866) 6 Suth W R Misc 98 (101) Beng L R Sup Vol 492 1 Ind Jur (N S) 421, *Fani Sahaye Singh v. Deyun Singh*

(1866) 6 Suth W R Misc 101 (106) 2 Ind Jur (N S) 1, *W G N Poy se v. Lantub Lal*.

(1867) 7 Suth W R 10 (10), *Shoo Chand Chunder v. Mr. D. Grant*.

(1867) 8 Suth W R 93 (98, 99), *Ishan Chunder Bose v. Jug Sundhoo Ghose*.

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Under the later Acts the *date of applying* was made the starting point of limitation. There has been a conflict of opinion on the question whether, under these Acts, the application should be bona

- (1867) 8 Suth W R 199 (199), *Ameerun Bibee v. Shib Pershad Thalocr.*
 (1867) 8 Suth W R 268 (268), *Kisto Kant Bural v. Nistarinee Debia.*
 (1867) 8 Suth W R 306 (307), *Tabbur Singh v. Motee Singh.*
 (1868) 9 Suth W R 443 (444, 445), *Tabbur Singh v. Motee Singh.*
 (1868) 9 Suth W R 565 (566), *Rajah Sutto Churn Ghosal v. Dhyrub Chunder Brohma.*
 (1868) 10 Suth W R 224 (224) : 12 Beng L R 506n, *Gunga Bishen Chund v. Maharajahdhiraj Mahalab Chund Bahadur.*
 (1868) 10 Suth W R 248 (248), *Kalee Kishore Bose v. Prosunno Chunder Roy.*
 (1869) 11 Suth W R 70 (71) : 2 Beng L R A C 191, *Luchmeeput Singh & 7 v. Wahed Ali.*
 (1869) 11 Suth W R 80 (80) : 2 Beng L R A C 196, *Raja Sutto Surn Ghossal v. Dhyrab Chunder Brohma.*
 (1869) 11 Suth W R 269 (269), *Brojendro Narain Roy v. Binode Ram Sen.*
 (1869) 11 Suth W R 567 (569) : 3 Beng L R App 17, *Gaur Mohan Banerjee v. Tara Chand Banerjee.*
 (1869) 12 Suth W R 281 (281), *Mahomed Baker Khan v. Sham Dey Keer.*
 (1869) 12 Suth W R 337 (338), *Juttadharee Singh v. Wuzeer Singh.*
 (1869) 12 Suth W R 436 (437) : 4 Beng L R A C 1, *Khaja Abdul Gannee v. N. P. Poyose.*
 (1870) 13 Suth W R 40 (41), *Ram Dhun Goor v. Gooroo Dossee Dossee.*
 (1870) 13 Suth W R 164 (166), *Modhoomotty Debia v. Dhunput Singh.*
 (1870) 14 Suth W R 112 (113), *Raj Coomar Baboo v. Judoo Bungshee.*
 (1871) 15 Suth W R 162 (162), *Maharajah Dhiraj Mahalab Chand Bahadur v. Modhoo Soodun.*
 (1871) 15 Suth W R 203 (204), *Meer Looft Ali v. Abco Bibee.*
 (1871) 15 Suth W R 356 (356), *In the matter of Kaleedass Ghose.*
 (1871) 15 Suth W R 449 (450), *Koylas Nath Ghose v. Nitya Shama Dossee.*
 (1871) 15 Suth W R 473 (473), *Taruck Chunder v. Huro Chunder.*
 (1871) 15 Suth W R 530 (531), *Moonshee Syud Ameer Ali v. Sahab Singh.*
 (1871) 16 Suth W R 267 (268), *Pran Kishore Deb v. Kishen Chunder Chowdhry.*
 (1871) 16 Suth W R 296 (297), *Uddoyto Churn Sahoo v. Ram Dhun Roy.*
 (1872) 17 Suth W R 99 (99), *Jado Lall v. Radha Kishen Musser.*
 (1872) 17 Suth W R 335 (335), *Jeykishen Shaha v. Bishola Moyee Choudram.*
 (1872) 18 Suth W R 193 (194), *Rajeeb Leechun Saha Chowdhry v. Mr. James Wilford Massey.*
 (1873) 18 Suth W R 254 (255), *Bullohee Kant Bhuttacharjee v. Koylash Chunder Roy.*
 (1873) 19 Suth W R 102 (103), *Molcond-math Bhadoory v. Shib Chunder Bhadoory.*
 (1873) 19 Suth W R 301 (302), *Mr. T. C. Lethbridge v. Proklad Sen.*
 (1873) 20 Suth W R 31 (31) : 12 Beng L R 500, *Chowdhry Wahed Ali v. Mullick Fnyet Ali.*
 (1874) 21 Suth W R 244 (244), *Hur Sahay Singh v. Gobind Sahay.*
 (1874) 21 Suth W R 418 (418), *Gossain Gopal Dutt Pandit v. The Court of Wards.*
 (1878) 3 Cal 47 (57) : 4 Ind App 127 : 3 Sar 721 : 3 Suther 423 : 1878 Fed Re No. 7 : 1 Ind Jur 457 (P.C.), *Delhi and London Bank v. Orchard.*
 (1879) 1 N W P H C R 145 (145), *Kishun Chund v. Koorar Akhunder Gur.*
 (1877) 4 Rom H C R A C 86 (87), *D. A. Dalra v. Lakshuman Harri Pail.*
 (1875) 1575 Rom P J 222 *Rajho v. Appa.*

fide, one class of cases holding that it should be² and another class of cases that it need not be so.³ The conflict must now be taken to have been set at rest by the decision of their Lordships of the Privy Council in *Khalil Ur Rahman v. Collector of Etah*,⁴ that it is not necessary for an application to be in accordance with law that it should have been made *bona fide*. In that case an application for execution was made on 2nd June 1925 in respect of a mortgage decree dated 29th June 1922, praying for the sale of the mortgaged properties. The Court ordered certain copies to be filed in answer to which the vakil stated that he simply wanted in that application to get the legal representatives of the judgment-debtor brought on the record. Notices were ordered to the alleged legal representatives but were returned unserved and the decree-holder taking no further steps, the application was struck off. The decree-holder again applied on 8th July 1926 for sale of the property. On this application, the legal representatives were brought on the record, but no further steps being taken this application also was struck off. Their Lordships, approving of the view taken by the Full Bench of the Allahabad High Court in *Kayastha Co. Ltd v. Sitaram Dubey*,⁵ observed as follows

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2. (1926) A I R 1926 All 95 (99) . 48 All 468 . 90 Ind Cas 938, *Shoo Prasad v. Mt. Narain Bai*
 (1926) A I R 1926 All 376 (376) . 93 Ind Cas 809, *Ram Bahadur v. Rahat Ali*. (Bogus application)
 (1931) A I R 1931 Bom 425 (425) . 134 Ind Cas 699, *Hari Mahadev v. Vishnu Balakrishna*.
 (1931) A I R 1931 Sind 160 (161) . 134 Ind Cas 1182 . 25 Sind L R 528, *Volkart Brothers v. Achrayram*.
 3. (1874) 22 Suth W R 512 (516) (F B), *Eshan Chander Dose v. Prannath Nag*.
 (1874) 22 Suth W R 154 (155) . 14 Beng L R 144n, *Rohinee Nundan Miller v. Dhaguan Chander Roy*
 (1875) 24 Suth W R 459 (460), *Mt Moracho Koor v. Chuntoorbhooj Sahay*.
 (1877) 3 Cal 518 (521) . 1 Cal L R 409, *Unnoda Persad Roy v. Koorpan Ali*.
 (1929) A I R 1929 All 625 (650) . 118 Ind Cas 17 . 52 All 11 (F B), *Kayastha Co., Ltd v. Sita Ram Dubey*.
 (1875) 23 Suth W R 327 (328), *Shurut Chunder Sen v. Abdool Khyr Mahmood Mohutesur Billah*
 (1883) 1883 Pun Re No . 23, *Daness v. Turton*
 (1878) 2 Md 1 (3) . 3 Ind Jur 208, *Prabhacara Row v. Potannah*
 (1891) 1891 All W N 148 (148), *Debi Dass v. Umrao Singh*.
 (1890) 1890 All W N 77 (78), *Halima Bibi v. Nishan Bibi*.
 (1930) 131 Ind Cas 678 (679) (All), *Rupai Bai v. Murat Tewari*
 (1930) A I R 1930 All 814 (814) . 124 Ind Cas 231, *Ram Nath v. Ram Sahai*
 (1928) A I R 1928 Oudh 337 (338) . 110 Ind Cas 704 . 3 Luck 5-0, *Rupaya Bibi v. Prag Tewari*
 (1930) A I R 1930 All 188 (189) . 122 Ind Cas 179, *Dharamdeo Rai v. Jwala Prasad*.
 (1935) A I R 1935 Nag 131 (132) . 31 Nag L R 333 . 156 Ind Cas 114, *Hannuman Lal Katar v. Sheonarayan Sonar*
 (1933) A I R 1933 Sind 78 (81) . 27 Sind L R 109 . 142 Ind Cas 4-2, *Achray-sing Ram Sing v. Achrayram Sahni*.
 (1934) A I R 1934 Pat 289 (289) . 149 Ind Cas 102, *Sri Bai v. Shobani Meher*.
 4. (1934) A I R 1934 P C 14 (16) . 147 Ind Cas 323 . 61 Ind App 62 . 55 All 993 (P C).
 5. (1929) A I R 1929 All 625 (650) . 118 Ind Cas 17 . 52 All 11 (F B).

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while in the former case it will not.⁴

Where a defective application, instead of being returned or rejected is *accepted* by the Court and action taken, it has been held that the application must be taken to have been in accordance with law.⁵

Where an application is *rejected* by the Court on the ground that it has not complied with the requirements of Order 21 Rules 11 to 14, it has been held that it cannot be considered to be one in accordance with law even though the omission was an immaterial one.⁶ Various reasons have been advanced for this view, but the true reason seems to be that a Court cannot reconsider at a subsequent stage of the execution proceedings its own order that such an application was not in accordance with law.

(1883) 6 Mad 250 (251), *Ramanandan v Periatambi*.

(1908) 31 Mad 68 (69) : 17 Mad L Jour 596 : 3 Mad L Tim 251, *Ramayyan v. Kadir Baoha Sahib*.

(1926) A I R 1926 Cal 1077 (1081) : 53 Cal 604 : 98 Ind Cas 166, *Pitambar*

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. Ghose. (List of

(1932) 135 Ind Cas 15 (15) (Mad), *Sangliya Pillai v. Muthu Chethiar*.
 (Party not signing and verifying application)

(1920) A I R 1920 Pat 615 (616) : 54 Ind Cas 933, *Sobran Mahton v. Mt. Sibulas Kuer*. (Decree-holder failing to comply with a conditional order of Court.)

(1922) 65 Ind Cas 120 (120) (Pat), *Guru Mahadeva Ashram Prasad Sahi Bahadur v. Mahabir Sukul*. (Amount of the decree and costs not shown—Held, material defect.)

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am Begam v.

(1929) A I R 1929 Bom 118 (110) : 46 Bom 960 : 63 Ind Cas 844, *Gulappa*

. Gurija Kant

and acted upon by a Court does not preclude it from looking behind to see whether the decree was barred at the date of the application.)

G. (1931) A I R 1931 Nag 154 (155) : 134 Ind Cas 681 : 28 Nag L R 7 (F D).
Gulamali v. Rajkumar Chatterji. (If the rejection is on other grounds, the Court dealing with the subsequent application must look to the previous application itself to see whether it was in accordance with law.)

(1919) A I R 1919 Cal 466 (467) : 41 Ind Cas 220, *Ishan Chandra Samui v. Dulal Chandra De*. (Amount which had been recovered in course of some previous proceedings was not correctly stated—Not in accordance with law.)

(1934) A I R 1934 Cal 1077 (1081) : 53 Cal 604 : 98 Ind Cas 166, *Pitambar*

rejection)

(1935) A I R 1935 Nag 131 (132) : 31 Nag L R 333 : 156 Ind Cas 114, *Hankman Lala Kalar v. Sheo Narayan Sonar*.

(1931) A I R 1931 All 722 (723) : 131 Ind Cas 23, *Sudeshwakari Prasad Narain Singh v. Palyhan Dule*.

[See also (1926) A I R 1926 All 376 (376) : 93 Ind Cas 302, *Ram Bahadur Singh v. Rahat Ali Khan*.]

fide, one class of cases holding that it should be² and another class of cases that it need not be so.³ The conflict must now be taken to have been set at rest by the decision of their Lordships of the Privy Council in *Khalil Ur Rahman v. Collector of Etah*,⁴ that it is not necessary for an application to be in accordance with law that it should have been made *bona fide*. In that case an application for execution was made on 2nd June 1925 in respect of a mortgage decree dated 29th June 1922, praying for the sale of the mortgaged properties. The Court ordered certain copies to be filed in answer to which the vakil stated that he simply wanted in that application to get the legal representatives of the judgment-debtor brought on the record. Notices were ordered to the alleged legal representatives but were returned unserved and the decree-holder taking no further steps, the application was struck off. The decree-holder again applied on 8th July 1926 for sale of the property. On this application, the legal representatives were brought on the record, but no further steps being taken this application also was struck off. Their Lordships, approving of the view taken by the Full Bench of the Allahabad High Court in *Kayastha Co Ltd. v. Sitaram Dubey*,⁵ observed as follows:

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(Clause 5)
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2. (1926) A I R 1926 All 95 (99) . 48 All 468 . 90 Ind Cas 939, *Sheo Prasad v. Mt. Narain Bai*
(1926) A I R 1926 All 376 (376) 93 Ind Cas 369, *Ram Bahadur v. Rahat Ali*. (Bogus application)
(1931) A I R 1931 Bom 425 (425) . 134 Ind Cas 699, *Harj Mahadev v. Vishnu Balakrishna*.
(1931) A I R 1931 Sind 100 (161) . 134 Ind Cas 1182 25 Sind L R 528, *Volkart Brothers v. Achrajram*.
3. (1874) 22 Suth W R 512 (516) (F B), *Eshan Chander Bose v. Prannath Nag*.
(1874) 22 Suth W R 154 (155) 14 Beng L R 144n, *Rohinee Nundan Mitler v. Bhagwan Chander Roy*.
(1875) 21 Suth W R 459 (460), *Mt. Moracho Koor v. Chutoorbhooj Sahoy*.
(1877) 3 Cal 518 (521) 1 Cal L R 408, *Unnoda Persad Roy v. Koorpan Ali*.
(1929) A I R 1929 All 625 (650) 118 Ind Cas 17 52 All 11 (F B), *Kayastha Co., Ltd. v. Sita Ram Dubey*
(1875) 23 Suth W R 327 (328), *Shurut Chunder Sen v. Abdool Khyr Mah-mood Mohulesur Dillah*.
(1883) 1883 Pun Re No. 23, *Baness v. Turton*
(1878) 2 Mad 1 (3) 3 Ind Jur 208, *Prabhadara Row v. Potannah*.
(1891) 1891 All W N 148 (148), *Debi Dass v. Umrao Singh*
(1890) 1890 All W N 77 (78), *Halima Bibi v. Nishan Bibi*
(1930) 131 Ind Cas 678 (679) (All), *Rupai Rai v. Murat Tewari*
(1930) A I R 1930 All 814 (814) 128 Ind Cas 231, *Ram Nath v. Ram Sahai*
(1928) A I R 1928 Oudh 337 (338) 110 Ind Cas 704 . 3 Luck 500, *Rupaya Bibi v. Prag Tewari*
(1930) A I R 1930 All 188 (189) 122 Ind Cas 179, *Dharamdeo Rai v. Jwala Prasad*
(1935) A I R 1935 Nag 131 (132) 31 Nag L R 333 156 Ind Cas 114, *Hannu-man Lala Kalar v. Sheenarayan Somar*.
(1933) A I R 1933 Sind 78 (81) 27 Sind L R 109 142 Ind Cas 409, *Achraj-sing Ram Sing v. Achrajram Sahni*
(1931) A I R 1931 Pat 289 (289) 149 Ind Cas 102, *Sri Rai v. Sheobens Mitler*.
4. (1931) A I R 1931 P C 14 (16) 147 Ind Cas 323 61 Ind App C2 55 All 993 (P C).
5. (1929) A I R 1929 All 625 (650) 118 Ind Cas 17 52 All 11 (F B).

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(Clause 6)
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"The applications were made in accordance with the provisions of the Code of Civil Procedure, and therefore in accordance with the law applicable thereto; they were made to the proper Court. They were obviously steps-in-aid of execution and they were made in time.

"To hold that it was necessary for the Court to be satisfied that the said applications were made *bona fide* and that the decree-holder had the intention of proceeding to execution in pursuance of each of the said applications, would be to import words into the terms of the Article which are not to be found therein and would necessitate the Court embarking upon the difficult and in some cases the impossible task of finding the motive of the decree-holder in making the applications."

86a. Effect of return, amendment, and rejection of application for execution. — Order 21 Rule 17 sub-rules 1 and 2 of the Code of Civil Procedure provide as follows :

"(1) On receiving an application for the execution of a decree as provided by Rule 11 sub-rule 2, the Court shall ascertain whether such of the requirements of Rules 11 to 14 as may be applicable to the case have been complied with ; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

"(2) Where an application is amended under the provisions of sub-rule 1, it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented."

Where the application is *amended*, under the provisions of sub-rule 1, then the application will be deemed to be in accordance with law when it was first presented, irrespective of the question whether the defect in the application as it was first presented was a *material one*^{1a} (i. e. a defect by reason of which it is not possible for

Note 86a

- 1a(1926) A I R 1926 Mad 260 (260, 261) · 92 Ind Cas 109, *Santharan Nair v. Ambu*. (Description of property omitted.)
 (1917) A I R 1917 Mad 836 (836) · 35 Ind Cas 876, *Kamatchi Ammal v. Pitchu Iyer*.
 (1919) A I R 1919 Mad 220 (221) · 52 Ind Cas 765, *Dalalubramanna Pullai v. Chit Co., Fela Nidhi Ltd*
 (1936) A I R 1936 Mad 91 (92) · 59 Mad 303 · 161 Ind Cas 93, *Kenchada Dalayya v. Sundara Narayana*.
 (1921) A I R 1921 Pat 23 (24) · 2 Pat 609 · 74 Ind Cas 174, *Bhagwat Prashad v. Dwarika Prashad*.
 (1923) 45 Mad L Jour 7 (7) (N R C)
 (1930) A I R 1930 Ouh 65 (66) · 5 Luck 453 · 124 Ind Cas 415, *Dryshis Singh v. Bhajwan Dass*
 (1910) 7 Ind Cas 19 (20) (Cal), *Kalanunil Singh v. Chandra Kishore Jais*
 (1912) A I R 1912 Pat 222 (224) · 134 Ind Cas 91 · 21 Pat 216, *Shes Goenka v. Mt. Kishun Bansi Kuer*.

the Court to proceed with the application) or an *immaterial* one.^{1b} It does not follow from this that where an application is returned for amendment, but is not amended, the application must necessarily be considered to be *not* in accordance with law.¹ In *Kamachi Ammal v. Pichu*,² their Lordships of the High Court of Madras observed :

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"We think that an execution petition returned for amendment but not re-presented, may yet give fresh starting point for limitation. We do not consider that Order 21 Rule 17, Civil Procedure Code, 1908, was intended to affect the construction put upon the words 'applying in accordance with law' in the Limitation Act by this Court and by other High Courts in dealing with defects in form occurring in execution applications. The Rule is an enabling one which allows certain defective applications subsequently amended to be deemed 'applications in accordance with law' with effect from the date of their first presentation."

See also the undermentioned cases^{2a} to the same effect.

The question, then, whether such an application is in accordance with law, depends upon the answer to another question whether the defect, for the amendment of which the application was returned, was a *material* defect, without the amendment of which further proceedings could not be taken, or was only a *formal* defect. In the latter case, the application will be one in accordance with law.³

- 1b(1925) A I R 1925 Oudh 399 (400) 86 Ind Cas 591 28 Oudh Cas 332, *Durga Prasad v. Johhu Ram*.
(1906) 3 Cal L Jour 41 (44) (S N) (Verification omitted)
(1930) A I R 1930 Oudh 65 (67) 5 Luck 453 124 Ind Cas 445, *Drigbijai Singh v. Bhagwan Dass*.
1. (1937) A I R 1937 Mad 385 (391) I L R (1937) Mad 616 . 168 Ind Cas 561 (F B), *Chudambara Nadar v. Rama Nadar*
(1921) A I R 1924 Pat 23 (24) 2 Pat 809 74 Ind Cas 174, *Dhaquat Prashad v. Dwarika Prashad*.
2. (1917) A I R 1917 Mad 836 (836) 35 Ind Cas 876.
2a(1916) A I R 1916 Mad 958 (958) 32 Ind Cas 691, *Narayanawami Naidugaru v. Gantayya*
(1915) A I R 1915 Mad 1201 (1201) 29 Ind Cas 16, *Seshayya v. Venkatasubbiah*.
(1933) A I R 1933 Mad 568 (569) 143 Ind Cas 614, *Thirupathi Ayyangar v. Yegnammal* (Case before amendment by Act 9 of 1927)
(1918) A I R 1918 Mad 1090 (1090, 1091) 40 Mad 919 33 Ind Cas 136, *Natesa Pillai v. Ganapathia Pillai*.
(1915) A I R 1915 Mad 1012 (1013) . 26 Ind Cas 413, *Vadivelu Pillai v. Marudai Pillai*.
(1916) A I R 1916 Mad 510 (510) 27 Ind Cas 611, *Mootha v. Sanlunni Nair*.
(1910) 5 Ind Cas 579 (581) (Cil), *Mathura Prasad v. Anurago Koer*.
(1916) A I R 1916 Mad 1155 (1156) 32 Ind Cas 816, *Narayanawami Naidu v. Muthalaya Venkatarutnam*
[See also (1882) 12 Cal L R 279 (280), *Synd Mohamed v. Abedollah*.]
[But see (1918) A I R 1918 Mad 401 (402) 42 Ind Cas 671, *Doortas Seshadri Iyer v. Ananthayya*]
3. (1892) 1892 All W N 114 (114), *Madho Singh v. Ram Bhanose Das*.
(1928) A I R 1928 Mad 440 (443) . 112 Ind Cas 86, *Abdul Khatim Sahib v. Lalshriarawami*.

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(Clause 5)
Note 86a

while in the former case it will not.⁴

Where a defective application, instead of being returned or rejected is *accepted* by the Court and action taken, it has been held that the application must be taken to have been in accordance with law.⁵

Where an application is *rejected* by the Court on the ground that it has not complied with the requirements of Order 21 Rules 11 to 14, it has been held that it cannot be considered to be one in accordance with law even though the omission was an *immaterial* one.⁶ Various reasons have been advanced for this view, but the true reason seems to be that a Court cannot reconsider at a subsequent stage of the execution proceedings its own order that such an application was not in accordance with law.

(1883) 6 Mad 250 (251), *Ramanandan v. Periatamb.*

(1908) 31 Mad 68 (69) : 17 Mad L Jour 596 : 3 Mad L Tim 251, *Ramayyan v. Kadir Baoha Sahib.*

(1926) A I R 1926 Cal 1077 (1081) : 53 Cal 664 : 98 Ind Cas 166, *Pilambar Jana v. Damodar Gachait.*

... .. v. Janaki Koer.]
 ya Nath Ghose. (List of

... .. lai v. Muthu Chettiar.

... .. Sobran Mahton v. Mt.
 nply with a conditional
 order of Court.)

(1922) 65 Ind Cas 120 (120) (Pat), *Guru Mahadeva Ashram Prosad Sahi Bahadur v. Mahabir Sukul.* (Amount of the decree and costs not shown—Held, material defect.)

5. (1920) A I R 1920 Pat 180 (181) : 58 Ind Cas 223 : 5 Pat L Jour 593, *Telaut Hanund.*

... .. Begam v.

(1922) A I R 1922 Bom 118 (119) : 46 Bom 269 : 63 Ind Cas 844, *Gulappa Rudrappa v. Erava Dasangoteda.*

[But see (1870) 3 Cal L R 572 (573), *Ishana Dabia v. Girsja Kant Lahiry.* (The fact that a previous application was accepted and acted upon by a Court does not preclude it from looking behind to see whether the decree was barred at the date of the application.)]

6. (1931) A I R 1931 Nag 151 (155) : 134 Ind Cas 681 : 29 Nag L R 7 (F P), *Gulamali v. Rajkumar Chatterji.* (If the rejection is on other grounds, the Court dealing with the subsequent application must look to the previous application itself to see whether it was in accordance with law.)

(1919) A I R 1919 Cal 466 (467) : 44 Ind Cas 220, *Ishan Chandra Samui v. Dulal Chandra De.* (Amount which had been recovered in course of some previous proceedings was not correctly stated—Not in accordance with law.)

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(1935) A I R 1935 Nag 131 (132) : 31 Nag L R 333 : 156 Ind Cas 114, *Hannu-man Lala Kalar v. Shro Narayan Sonar.*

(1931) A I R 1931 All 722 (723) : 131 Ind Cas 33, *Sudeshwari Prasad Narain Singh v. Paljhan Dube.*
 [See also (1926) A I R 1926 All 376 (376) : 93 Ind Cas 302, *Bahadur Singh v. Bahat Ali Khan.*]

Order 21 Rule 17 sub-rule 2 of the Code of Civil Procedure contemplates the amendment of an application *before admission and registration*. It gives a *discretion* to the Court to allow or refuse amendment of the application.⁷ If the Court overlooks the defects and registers the application, the question whether the defects can subsequently be amended depends on whether the decree is or is not barred on the date of the amendment. If there is no bar of limitation, the application can be amended,⁸ as a substantive fresh application can be entertained on that date and there is nothing in the Code to prevent the Court from treating it as a fresh application.

Suppose, on the date when the defect is sought to be remedied the decree is barred by limitation. There is a conflict of opinion as to whether an amendment can be allowed in such a case. According to the Calcutta High Court no such amendment is permissible, the reason being that the Court is not empowered under the Rule to allow the amendment.⁹ The Madras High Court¹⁰ has held that the Court has a discretion to allow an amendment under sub-rule 1 of Order 21 Rule 17, even if the application for amendment is made after the expiry of the statutory time, the reason being that the law casts a duty upon the Court to notice the defects in the application before

Prasad.

(1910) 5 Ind Cas 532 (535) . 37 Cal 899, *Chhayunnessa Bibi v. Kazi Basirar Rahaman*.

8 (1932) A I R 1932 Pat 806 (807) : 11 Pat 508 : 199 Ind Cas 840, *Braja Sunder Das v. Radha Prasad Bhagat*.

(1923) A I R 1923 Pat 224 (225) : 2 Pat 828 : 71 Ind Cas 741, *Ram Sumran Prasad v. Ram Bahadur*.

(1910) 5 Ind Cas 532 (535) . 37 Cal 899, *Chhayunnessa Bibi v. Kazi Basirar*.

(1914) A I R 1914 Mad 663 (664) : 21 Ind Cas 782, *Varadiah v. Kumara Venkata Perumal Raja Bahadur Varu*.

6 . 138 Ind Cas 91, *Sheogobind*

: 119 Ind Cas 411, *Jagannath*

Cas 337, *Salimulla Bahadur v.*

Salmulla Bahadur.

(1900) 17 Cal 631 (636) (F B), *Asgar Ali v. Trilokhya Nath Ghose*. (Overruling 14 Cal 121.)

(1925) A I R 1925 Cal 1048 (1050) : 85 Ind Cas 742, *Abul Hasmat Ahmad*

: 1 Cas 1017,

v. Sobay-

10. (1926) A I R 1926 Mad 21 (25) : 107 Ind Cas 303, *Maheshwaran Nambudri-*

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(Clause 8)
Notes 86a-86b

admission, and if the Court or its officer had done such duty properly, the defects could have been remedied within time. The Bombay High Court has expressed the view that if the application for execution is within time, but the application for amendment is made after the twelve years have expired, the application for amendment should not be straightway rejected but must be considered on its merits, and that the matter being in the discretion of the Court, it would depend upon the nature of the amendment whether it should or should not be allowed.¹¹ The High Courts of Allahabad,¹² Lahore¹³ and Patna,¹⁴ and the Judicial Commissioner's Court of Peshawar¹⁵ have also allowed the defects to be remedied though the decree was barred on the date of the amendment.

Where the Court grants time for amendment under the provisions of sub-rule 1 of Rule 17 of Order 21 of the Code of Civil Procedure, it can subsequently enlarge the time so granted.¹⁶

86b. Withdrawal of application.— Before the date of decision of their Lordships of the Privy Council in *Thakur Prasad v. Fakir Ullah*,¹ there was a conflict of opinion as regards the effect of withdrawal of an execution application. According to one view, the application withdrawn was to be treated as non-existent and the question of limitation with regard to a subsequent execution application was to be determined as if the first application had never been made at all.² According to the other view, the application which was withdrawn was not to be treated as a nullity, but would furnish a fresh starting point of limitation.³ The decision of the Privy Council

11. (1937) A I R 1937 Bom 865 (370) : 170 Ind Cas 877 : I L R (1937) Bom 691, *In re Janki Prasad Poddar*.
- (1938) A I R 1938 Bom 405 (407, 408) : I L R (1938) Bom 708 : 177 Ind Cas 989, *Mahomed Bhai v. Dawoodbhai & Co.*
12. (1898) 20 All 478 (480) 1898 All W N 128, *Jiwat Dube v. Kali Charan Ram*.
- (1893) 1893 All W N 112 (113), *Ajudharam v. Muhammad Munir*.
[See (1905) 2 All L Jour 367 (369), *Muhammad Ras v. Ali Sajjad*.]
13. (1920) A I R 1920 Lah 122 (122) : 55 Ind Cas 16, *Ganesh Das v. Fattah Chand*.
14. (1932) A I R 1932 Pat 222 (223) 11 Pat 546 : 138 Ind Cas 91, *Sheogobind Ram v. Mt. Kishunbansi Kuer*.
15. (1934) A I R 1934 Pesh 40 (42) : 152 Ind Cas 443, *Ahmad Ali v. Mt. Fatima Sultan*.
16. (1882) 8 Cal 473 (481) : 10 Cal L R 519, *Kamini Mohun v. Gopal*.
(1916) A I R 1916 Cal 356 (357) : 34 Ind Cas 625, *Gopal Proshad v. Rajendra Lal*.

Note 86b

1. (1895) 17 All 106 (111, 112) : 22 Ind App 44 : 5 Mad L Jour 3 : 6 Sar 526 (P C).
2. (1885) 7 All 359 (361, 362) : 1885 All W N 51, *Kafayat Ali v. Ram Singh*.
(1887) 10 All 71 (78) : 1888 All W N 1, *Sarju Prasad v. Sita Ram*.
(1881) 6 Bom 681 (683), *Pirjade v. Pirjade*.
(1888) 1888 All W N 272 (273), *Mahtab Kuar v. Shamsundar Lal*.
3. (1885) 10 Bom 62 (65), *Tarachand Megraj v. Kashinath Trimbah*.
(1887) 11 Bom 467 (469) : 1887 Bom P J 2S, *Shankar Disto Nadgir v. Nar-singhrao Ramchandra*.
(1910) 8 Ind Cas 833 (834) (Cal), *Musaraf Ali v. Amir Jan Dabee*.

in *Thakur Prasad's case*¹ set the conflict at rest by upholding the view that the withdrawal did not prevent the application from furnishing a fresh starting point

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Notes 86b-87

After the amendment of 1927, the starting point under clause 5 of the Article is the date of final order on the application. An application withdrawn without leave can only be dismissed, and the dismissal will be a final order on the application which will give a fresh starting point of time.

87. "Proper Court"—General.—Under Explanation II, "proper Court" has been defined as meaning the Court whose *duty* it is to execute the decree or order.¹ This necessarily implies that unless a Court has the jurisdiction to execute the decree or order, it will not be a proper Court within the Explanation, as a Court cannot be under a *duty* to do a thing which it has no *jurisdiction* to do

The word "execute" in Explanation II would seem to be used in a liberal sense as including the power to *entertain* an application for execution, so that an application for execution made to a Court which can only entertain the application and transfer it to another Court for execution, but cannot itself proceed to execute the decree in the manner asked for, may be an application made to a "proper Court."²

Further, if the application contemplates execution in any particular manner, the Court that is competent to entertain an application for execution in *that* manner, will alone be a proper Court within Explanation II. Thus, in *Maharaja of Bobbili v. Sri Raja Narasaru Peda Baliara Simhulu*,³ a decree passed by a Court at V was transferred for execution to a Court at P. The latter Court attached the property of the judgment-debtor which was within its jurisdiction, in execution of the decree. Then, before the Court at P sent to the Court at V a certificate under Section 41 of the Civil Procedure Code reporting the result of the execution, an application was made to the Court at V for *sale* of the property attached. It was held by the Privy Council that the application was not made to a proper Court within the meaning of clause 5.

Under clause 5, *both* an application for execution and an application to take a step-in-aid of execution must be made to a proper Court, in order to save limitation under the clause. Hence, in view of the definition of the expression "proper Court" in Explanation II, even an application to take a *step-in-aid* of execution must be made

Notes 87

1. See (1874) 21 Suth W R 410 (411), *Prokhash Chunder Lahory v. Poorno Chunder Roy* (Under Article 167 of the Act of 1871, the term was defined as Court whose duty it was, by transfer or otherwise, to execute the decree.)

3. (1916) A I R 1916 P C 16 (19) : 39 Mad 640 : 43 Ind App 238 : 36 Ind Cas 682 (P C).

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Notes 87-88**

to a Court whose duty it is to *execute* the decree.^{3a}

In the undermentioned case⁴ it was doubted by Marten, J., of the Bombay High Court whether an application for execution made against a talukdar without a certificate under Section 29 E of the Gujerat Talukhdars' Act (1888) is one made to a proper Court, because in the absence of such certificate there is no duty resting on any Court to execute the decree. It is submitted that the learned Judge has not applied a correct test in determining whether a Court is a proper Court within the meaning of Explanation II. Clause 5 clearly makes a distinction between the question of an application being in accordance with law and that of the application being presented to the proper Court. Hence, the definition in Explanation II must be taken to refer to a Court whose duty it is to execute the decree or order *if* an application in accordance with law is presented to it. A defect on account of which *no* Court is competent to deal with an application must, it is conceived, be held to be a matter which makes the *application* not one in accordance with law and not a defect which makes the *Court* to which the application is presented not a proper Court.

The expression "Court whose duty it is to execute the decree" occurs also in the Civil Procedure Code, Order 21 Rule 2. Hence, it is conceived that decisions bearing on the interpretation of the expression in the above provision may also be referred to for the purpose of determining what is a "proper Court" as defined in Explanation II.

88. Execution beyond local jurisdiction — Application to Court passing decree, if one made to proper Court.— Even in cases where the property sought to be proceeded against is outside the local limits of the jurisdiction of the Court which passed the decree, or the judgment-debtor resides outside such limits, the Court which passed the decree has jurisdiction to *entertain* an application for execution and hence is a proper Court within the meaning of Explanation II.¹

8a. See Note 101 *infra*.

4. (1918) A I R 1918 Bom 73 (78) : 43 Bom 44 : 47 Ind Cas 726, *Hargotind Fulchand v. Naja Sura*.

Note 88

- Note 55
1. (1897) 2 Cal W N 415 (417), *Rama Nath Sen v. Gouri Sankar*. (Application for transfer of decree.)
 - (1923) A I R 1923 Oudh 9 (12) ; 69 Ind Cas 600 : 26 Oudh Cas 71, *Sheo Ram v. Ram Bharsey*.
 - (1936) A I R 1936 Rang 271 (274) : 14 Rang 550 : 163 Ind Cas 403, *Arjunadas Bisumalal v. U Ka Ya*. (Application for execution in respect of property outside jurisdiction.)
 - (1931) A I R 1931 Cal 312 (317) : 58 Cal 832 : 132 Ind Cas 149, *Sreenath Chakrathathi v. Priyanath Bandopadhyaya*. (Do.)
 - (1931) A I R 1931 Cal 312 (317) : 58 Cal 832 : 132 Ind Cas 149, *Moula Ballesh v. Mahesh*. (Do.)
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Court

89. Transfer of decree to another Court for execution — Jurisdiction of transferring Court.—In *Maharaja of Bobbili v. Sri Raja Narasaraju Peda Baliara Simhulu Bahadur*,¹ a money decree was passed by a Court at V. The decree was transferred for execution to the Court at P. The latter Court attached in execution of the decree certain property belonging to the judgment-debtor which was within its jurisdiction. Then, before the decree was returned to the Court at V with the certificate of non-satisfaction by the Court at P, an application was made to the former Court for sale of the property that was within the jurisdiction of the Court at P and had been attached by such Court. In holding that the application was not made to a proper Court, the Privy Council observed as follows :

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Note 89**

"As the decree of the 5th April 1904 had by order of the Court of the District Judge been sent on the 30th September 1904 to the Court of the Munsif of Parvatipur for execution by the latter Court, and as the copy of the decree with the non-satisfaction certificate was not returned to the Court of the District Judge until the 3rd August 1910, and as the petition of the 13th December 1907 was for execution of the decree by sale of the immovable property of the respondents which was within the local limits of the jurisdiction of the Munsif's Court, their Lordships having regard particularly to Sections 223, 224, 228 and 230 of the Code of Civil Procedure, 1882, are satisfied that when that petition of the 13th December 1907 was presented to the Court of the District Judge, that Court was not the proper Court to which the application to execute the decree by sale of the immovable property which had been attached by the Court of the Munsif should have been made, and that the proper Court to which that application should have been made was the Court whose duty it then was to execute the decree so far as it could be executed by that Court."

There is a conflict of judicial opinion about the interpretation of the above ruling of the Privy Council. According to some decisions,

(1929) A I R 1929 Rang 95 (95) : 116 Ind Cas 474, *Kathirasan Chettyar v. Ma E*
to the
although
Court's jurisdiction.)

(1934) A I R 1934 Pat 192 (194) : 13 Pat 21 : 155 Ind Cas 760, *Chandan Mal Marwari v. Shub Prasad Singh*.

(1936) A I R 1936 Cal 267 (268) : 162 Ind Cas 777, *Amarendra Nath v. Balai Chand*.

[But see (1926) A I R 1926 All 95 (97) : 48 All 468 : 90 Ind Cas 938, *Sheo Prasad v. Mt. Narayans Bai*.]

Note 89

1. (1916) A I R 1916 P C 16 (18) : 39 Mad 640 : 43 App 238 : 86 Ind Cas 682 (P C).

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the above ruling lays down that till the return of the decree with the certificate of non-satisfaction by the Court to which the decree has been transferred, the Court which has passed the decree has no jurisdiction to execute the decree or to entertain an application for the execution of the decree.² But according to other decisions,³ the above ruling of the Privy Council must be confined to the peculiar facts of the case and must be held to lay down only that the Court passing the decree cannot entertain an application for the sale of the property which has been attached by the Court to which the decree has been transferred, and not that in every case the Court passing the decree will have no jurisdiction to execute the decree till the certificate of non-satisfaction is sent by the Court to which the decree has been transferred.

It is submitted that the latter view is correct. Hence, where Court A passes a decree and transfers it for execution to Court B an application made to the former Court for transfer of the decree to

2. (1933) A I R 1933 Cal 906 (908) : 60 Cal 1176 : 149 Ind Cas 17, *Jatendrakumar Das v. Mahendrachandra Banikya*.
- (1930) 43 Cal W N 185 (186), *Ram Kishan Ram Bhakat v. Satya Narain*.
- (1934) A I R 1934 Lah 728 (729) : 152 Ind Cas 128 : 16 Lah 80, *Rulia Ram v. Duan Chand*.
- (1931) A I R 1931 Lah 14 (14) : 130 Ind Cas 521, *Dwanchand v. Rallia Ram*.
- (1925) A I R 1925 Lah 233 (235) : 78 Ind Cas 241, *Firm Sheru Mal Chhna Mal v. Firm Hira Lal Anant Ram*.
- (1918) A I R 1918 Mad 580 (582) : 40 Mad 1069 : 42 Ind Cas 291 (F B), *Pierce Leslie & Co. Ltd. v. Perumal*.
- (1925) A I R 1925 Oudh 492 (493) : 28 Oudh Cas 169 : 85 Ind Cas 455, *Mahomed Shakir v. Jugal Kishore*.
- (1923) A I R 1923 Pat 884 (884) : 2 Pat 247 : 74 Ind Cas 608, *Jnanendra Nath Ghose v. Jogindra Narain Sinha*.

See also the following cases which were decided before the above Privy Council decision and which proceeded on the view that the transferring Court had no jurisdiction to execute the decrees before the return of the decree with the certificate of non-satisfaction by the Court to which the decree has been transferred :

- (1882) 1882 All W N 171 (171), *Budhi Bibi v. Indar Koer*. (A second application by the decree-holder to the original Court to give him a second certificate of transfer, the first being still subsisting and operative, would not be an application made in accordance with law, nor was it made to the proper Court.)
- (1900) 1900 All W N 88 (89), *Har Sahai v. Sham Lal*. (Do.)
3. (1935) A I R 1935 Cal 99 (100) : 154 Ind Cas 731, *Rajani Kanta v. Golam Mahuuddin*.
- (1935) A I R 1935 Lah 465 (473) : 157 Ind Cas 488 (F B), *Kanti Narain v. Madan Gopal*.
- (1930) A I R 1930 Lah 199 (201) : 121 Ind Cas 68, *Hanuman Balsh v. Chunna Mal*.
- (1928) A I R 1928 Mad 493 (494) : 110 Ind Cas 829, *Mehadum Beg Sahib v. Muhammad Meera Sahib*. (A I R 1922 Bom 359, Dissented from.)
- (1937) A I R 1937 Nag 305 (308) : I L R (1937) Nag 440 : 173 Ind Cas 51, *Thakur Vishwanath Singh v. Mahabir Prasad*.
- (1939) A I R 1939 Pat 144 (145) : 17 Pat 617 : 180 Ind Cas 311, *Firm Dwarkadas Gobindram v. Firm Saligram Rekhraj*.

See also cases in Foot-Notes 4 and 5 below.

another Court,⁴ or for the recall of the decree to itself,⁵ is an application made to a proper Court.

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Where an application for execution is made to the transferring Court before the transferee Court sends the certificate of non-satisfaction but such certificate is sent subsequently, it was held in the undermentioned cases⁶ that the defect is not cured and the application must be regarded as not made to the proper Court. But if the view that the transferring Court continues to have jurisdiction to execute the decree even after the transfer of the decree is accepted as correct, the above question cannot arise.

Even assuming that once a decree has been transferred to another Court for execution the Court which passed the decree has no jurisdiction to execute it until the decree comes back to it in some way, it has been held that where a Court which passed a decree has ordered it to be sent to another Court for execution but the decree has not been actually transferred in accordance with the order, the Court which passed the decree continues to be the "proper Court" for receiving applications for execution.⁷

90. Transfer of decree to another Court — Jurisdiction of transferee Court.— Under Section 38 of the Civil Procedure Code, a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Hence, a Court to which a decree has been sent for execution is a "proper Court" within the meaning of Explanation II. The jurisdiction of such Court to execute the decree continues until it sends (under Section 41, Civil Procedure Code) to the Court which passed the decree the certificate reporting the result of the execution by it or until the execution proceedings are withdrawn or transferred from it. Hence, an application for execution or to take a step-in-aid of execution made to the transferee Court at any time before such certificate is sent or the execution proceedings are withdrawn or transferred from the transferee Court,

4. (1938) A I R 1938 Mad 113 (115) ; I L R (1938) Mad 826 : 176 Ind Cas 753, *Muthu Rama Reddi v. Motilal Daga*
- (1928) A I R 1928 Mad 493 (494) : 110 Ind Cas 629, *Mahadum Beg Sahib v. Md Meera Sahib*.
- (1927) A I R 1927 Nag 367 (367), *Gosind v. Lazman*.
- (1928) A I R 1928 Nag 29 (30) : 23 Nag L R 126 : 101 Ind Cas 279, *Gosind v. Lazman*.
5. (1939) A I R 1939 Pat 144 (146) : 17 Pat 617 : 180 Ind Cas 311, *Firm Dwarkadas Gobindram v. Firm Saligram Rekhranj*.
6. (1931) A I R 1931 Lah 14 (14) : 130 Ind Cas 521, *Dewan Chand v. Rallia Ram*. (Confirmed on Letters Patent Appeal in A I R 1934 Lah 728.)
- (1933) A I R 1933 Cal 906 (908) : 60 Cal 1176 : 149 Ind Cas 17, *Jatindra Kumar Das v. Mohendra Chandra Banikya*.
[But see (1926) A I R 1926 Lah 113 (114) : 89 Ind Cas 958, *Firm Hira Lal-Anant Ram v. Firm Sheru Mal-Chuna Mal*.]
7. (1922) A I R 1922 Pat 301 (303) : 1 Pat 328 : 65 Ind Cas 332, *Ramachandra Marwari v. Krishana Lal Marwari*.
- (1933) A I R 1933 Sind 78 (80) : 27 Sind L R 109 : 142 Ind Cas 489, *Achraj Sing Ram Sing v. Achrajram Sahni*.

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is an application made to a "proper Court."¹ But, where the transferee Court has returned the decree to the Court by which it was passed, the transferee Court has no longer any jurisdiction to execute the decree and an application made to it will not be one made to a proper Court.² In some decisions, however, the view has been expressed that the return of the decree by the transferee Court does not make it anytheless a Court to which the decree has been sent for execution within the meaning of Section 38 of the Civil Procedure Code and therefore, such Court continues to be a "proper Court" notwithstanding the return of the decree.³ It is submitted that the view is not correct.

It has been held that where a decree has been *ordered* to be transferred for execution to another Court, the latter Court is competent to entertain an application for the execution of the decree though it has not actually received the copy of the decree at the time of the application.⁴

91. Change in territorial or pecuniary jurisdiction of Court which passed the decree—Effect.—It is a general principle of law that when once a Court has jurisdiction to entertain a suit, it does not ordinarily lose such jurisdiction by reason of subsequent events.¹ On this principle, where a decree is passed in respect of certain property and subsequently the area in which the property is situated is transferred to the local jurisdiction of another Court, the Court which passed the decree can entertain an application for the execution of the decree. Hence, an application for execution or to

Note 90

1. (1936) A I R 1936 Cal 571 (572) : 166 Ind Cas 374, *Kshirode Chandra v. Brahmanath Pal*. (The irregularity in the mode of transfer of a decree, in that the transfer is not made on an express prayer made by the decree-holder, does not prevent the transferee Court from having the seisin over the execution and hence it is a proper Court.)

(1929) A I R 1929 Bom 418 (420) : 53 Bom 844 : 123 Ind Cas 507, *Fatechand*

Court.)

(1932) A I R 1932 Pat 296 (297) : 11 Pat 513 : 139 Ind Cas 843, *Seshaiyer Rajamannar Iyer v. Madan Mohan Patnaik*.

(1909) 1 Ind Cas 57 (61) (Cal), *Manorath Das v. Ambica Kanta Bose*. (The mere striking off of an execution proceeding does not indicate its final determination.)

2. (1926) A I R 1926 Mad 1209 (1209) : 93 Ind Cas 455, *Mir Mahomed Noor-ulla Sahib v. Hasarath Kibulai Sayyad Ghulam Ghouse Sha Sahib Kadvi*.

3. (1888) 1888 Pun Re No. 168, *Harbhaj Rai v. Mahand Lal*.

(1922) A I R 1922 Nag 210 (212) : 63 Ind Cas 657 : 18 Nag L R 178, *Indra Raj Singh v. Murad Khan*.

4. (1933) A I R 1933 Mad 627 (628) : 56 Mad 692 : 144 Ind Cas 923, *Modali Ademma v. Lanka Venkata Subbayya*. (35 Mad 589, Followed; A I R 1923 Mad 496, Dissented from.)

Note 91

1. See Authors' Civil Procedure Code, 2nd Edition, Section 37 Note 5.

take a step-in-aid of execution, made to the Court which passed the decree in such a case would be an application made to a proper Court within Explanation II.² As the Court which passed the decree does not cease to have jurisdiction in such cases, the Court to whose jurisdiction the area is transferred does not become the Court which passed the decree under Section 37 of the Civil Procedure Code, and hence, an application made to the Court to whose jurisdiction the area is transferred is not made to the proper Court.³

A decree, say, for Rs 1500, is passed by a Court whose presiding officer has jurisdiction to try suits upto Rs. 2000. He is succeeded by an officer who is invested only with jurisdiction to try suits upto the value of Rs 1000. An application for execution made to the successor is one made to a proper Court, the reason being that in such circumstances the Court does not cease to have jurisdiction to execute the decree passed by it.⁴

92. Court passing decree ceasing to exist — Effect. — Where the Court by which the decree was passed has ceased to exist, the application for execution may be made to the Court which, if the suit had been instituted at the time of making the application, would have jurisdiction to try the suit. Hence, such Court would be a "proper Court" within the meaning of Explanation II.¹ (See Civil Procedure Code, Sections 37 and 38.)

93. Appellate Court. — It is the duty of the Court of *first instance* to execute a decree. So, an application made to a Court to which an appeal against the decree has been preferred is not one

2. (1920) A I R 1920 Mad 427 (436) : 42 Mad 821 : 53 Ind Cas 213 (F B), *Seeni Nadan v. Muthuswamy Pillai*.

(1925) A I R 1925 Bom 414 (414) : 89 Ind Cas 87, *Jagannath Nathu v. Ichharam Naroba Vani*.

(1890) 6 Cal 513 (515, 516, 519) : 7 Cal L R 521 : 5 Ind Jur 414, *Luchman Pundeh v. Maddan Mohan Shye*.

[See (1906) 30 Mad 537 (539, 540) : 17 Mad L Jour 417 : 2 Mad L Tim 466, *Panduranga Mudaliar v. Vythilinga Reddi*]

Murruu & son.

(1917) A I R 1917 Mad 257 (258) : 35 Ind Cas 237, *Penugonda Rattan v. Koranka Thata*.

(1918) A I R 1918 Mad 401 (401) : 42 Ind Cas 671, *Doorvas Seshadri Iyer v. Ananthayee*.

(1914) A I R 1914 Mad 162 (166, 168) : 22 Ind Cas 899 : 37 Mad 462, *Subbiah Nascher v. Ramanathan Chettiar*.

3. (1935) A I R 1935 Mad 935 (935) : 158 Ind Cas 811, *Palani Velu v. Somasundaram Pillai*.

4. (1933) A I R 1933 Cal 684 (687) : 149 Ind Cas 1024, *Abdus Sattar v. Mohini Mohan Das*.

(1916) A I R 1916 Pat 8 (3) : 30 Ind Cas 63 : 2 Pat L Jour 113, *Isware Prasad Singh v. Farhat Hussain*.

Note 92

1. (1931) A I R 1931 Cal 312 (316) : 58 Cal 832 : 132 Ind Cas 149, *Sreenath Chakravarti v. Priyanath Bandopadhyaya*.

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made to a proper Court.¹ See also Note 105 *infra*.

93. Temporary Court, decree passed by.—A Court is established temporarily for a period of one year. The Court passes a decree during that year. After the expiry of the year, the Court is continued for a further period. In such a case, even with regard to an application for execution made *after* one year from the establishment of the Court, such Court is the “proper Court” to which the application should be made. The reason is that the Court does not cease to be the “Court which passed the decree” merely because the period for which it was originally established has expired.¹

95. Court in Native State.—In *Pierce Leslie and Co., Ltd. v. Perumal*,¹ the question arose as to whether an application made to a Court in British India to send to a Court in a Native State (between which and the British Government there existed a reciprocal arrangement for the execution of each other's decrees) the necessary papers to enable the latter Court to execute a decree passed by the Court in British India, was an application to take a step-in-aid of execution. It was held by a Full Bench of the Madras High Court that such an application was not one to take a step-in-aid of execution. In giving reasons for the decision, Wallis, C. J., observed as follows :

“First with regard to clause 5 in column 3 : an application to the Travancore (the Native State in question) Court to execute the decree of a British Court under powers conferred upon it by the Legislative authority in Travancore would not, in my opinion, be an application “in accordance with law to the proper Court for execution” within the meaning of the Article so as to create a fresh starting point for the execution of the decree by the executing Court in British India. The proper Court, in my opinion, for such an application is the executing Court under the law of British India, which, as already shown, is not the Travancore Court. The Limitation Act extends only to British India and has no operation *proprio vigore* in Travancore. It prescribes periods of limitation as to the filing of suits and the execution of decrees in British India, and when it makes an application in accordance with law to a proper Court a fresh starting point, it must be taken to mean an application in accordance with the provisions of the law in British India to be found in the Code of Civil Procedure to which the Article refers or elsewhere. It cannot have been the intention of the Legislature

Note 93

1. (1913) 21 Ind Cas 639 (641) (Mad), *Kelu Nair v. Meenalshi*. (Decision bearing on Civil Procedure Code, O. 21, R. 2.)

Note 94

- 1 (1935) A I R 1935 Mad 849 (849, 850) : 58 Mad 1009 : 159 Ind Cas 835, *Ramanathan Chettiar v. Muthayyan Chettiar*.

Note 95

1. (1916) A I R 1916 Mad 550 (584) : 40 Mad 1060 : 42 Ind Cas 294 (F B).

to make an application for execution to a Court in a foreign State, under the law of that State and governed by the law of limitation there in force, a fresh starting point under our Limitation Act for the execution of our own decrees in our own Courts. If this be so, I am equally of opinion that an application to a British Court to take a step-in-aid of the execution by a Travancore Court of the decree of a Court in British India would not be an application to take some step-in-aid of the execution of the decree within the meaning of clause 5 of the Article."

The opinion above expressed, viz. that a Court in a Native State cannot be a proper Court within the meaning of clause 5 was, however, dissented from in a later ruling of the same High Court² in which it was held that an application made to a Court in a Native State for transmission of papers to a British Indian Court to enable the latter Court to execute a decree passed by the Court in the Native State, was an application to take a step-in-aid of execution capable of saving limitation under clause 5. The view taken was that the question whether the application to the Court in the Native State was an application according to law made to a proper Court must be determined with reference to the law in force in the Native State. The earlier Full Bench decision in *Pierce Leslie and Co.'s case*¹ was distinguished on the ground that in that case, the question was with regard to an application to a British Indian Court for transmission of papers to a Court in a Native State, whereas in the later case the question was with reference to an application to a Court in a Native State for transmission of papers to a Court in British India.

The Bombay High Court has also proceeded on the view that a Court in a Native State may be a proper Court within the meaning of Explanation II. Thus, it has been held that where a decree passed by a Court in a Native State (as to which action has been taken by the Government under Section 44 of the Civil Procedure Code and which is executable by Courts in British India), is transferred for execution in British India, proceedings before the Court in the Native State must be held to be proceedings taken before a "proper Court" within the meaning of Explanation II so as to save limitation under clause 5.³ Similarly, it has been held that where a decree passed by a Court in British India has been transferred for execution to a Court in a Native State, an application to the Court in the Native State for the return of the decree to the Court in British India is an application to take a step-in-aid of execution and will save limitation under clause 5.⁴

95. Application to Collector. — A Collector or Tahsildar enforcing a decision of an Assistant Registrar of Co-operative Societies

2. (1923) A I R 1923 Mad 72 (73, 74) : 45 Mad 1014 . 69 Ind Cas 932, *Srinivasa Iyengar v. Narayana Rao*.
3. (1921) A I R 1921 Bom 256 (257) : 59 Ind Cas 747 : 45 Bom 453, *Prabhulingappa v. Gurunath Balaji*.
4. (1929) A I R 1929 Bom 418 (420) : 53 Mad 844 : 123 Ind Cas 507, *Fatechand v. Jitmal*.

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under the rules framed under the Co-operative Societies Act is not a *Court* and an application made to him does not save limitation for execution of the decision by a Civil Court.¹ Similarly, an application made to the Collector to enforce an award under Section 59 sub-section 1 clause (b) of the Bombay Co-operative Societies Act, 7 of 1925, is not one made to a *Court* and cannot save limitation under clause 5.²

A decree for sale on a mortgage was passed in favour of *A. B.*, the holder of a money decree against the same judgment-debtor, attached the mortgaged property. The money decree was transferred to the Collector for execution. *A.*, the mortgage decree-holder, applied to the Collector praying that the property should be sold subject to his lien. It was held that the application was not one made to the proper Court as the Collector was not a Court whose duty it was to execute the mortgage decree.³

See also the undermentioned case.⁴

97. Insolvency Court, application to.—An application to an Insolvency Court under Section 28 sub-section 2 of the Provincial Insolvency Act of 1920 for leave to execute the decree against the insolvent is not an application made to the proper Court within the meaning of Explanation II. The mere fact that the presiding officer of the Insolvency Court and the Court which is entitled to execute the decree is one and the same person will not make the two Courts the same so as to make the application to the Insolvency Court one to the Court entitled to execute the decree.¹

98. "Proper Court"—Other illustrative cases.—A Conciliator appointed under the Dekkhan Agriculturists' Relief Act of 1879 is not a *Court* and so an application for execution made to him does not save limitation under clause 5.¹

A decree was passed by an Additional Munsiff of a certain place. An application for execution was made to the principal Munsiff of the place. It was held that it was made to a proper Court as the Courts of the two Munsiffs were the same.²

Note 96

1. (1936) A I R 1936 Mad 150 (151) : 59 Mad 257 : 160 Ind Cas 520, *Abdul Razak Sahib v. Kilpatti Co-operative Society*
2. (1938) A I R 1938 Bom 424 (425) : 177 Ind Cas 897, *Maratha Co-operative Credit Bank of Dharwar v. Keshav Trimbak Hunda*.
3. (1933) A I R 1933 Oudh 564 (566) : 146 Ind Cas 805 : 9 Luck 273, *Tilla Singh v. Tirbhawan Singh*.
4. (1892) 1882 Pun Re No 190, *Basawa Mal v. Sirdar Amar Singh*. (An application to any Revenue Officer, other than the Court passing the decree, to give effect to the agreement intended to modify the decree of a Civil Court, is not one made to a proper Court.)

Note 97

1. (1934) A I R 1934 Mad 392 (394) : 57 Mad 808 : 150 Ind Cas 113, *Carichan v. Kunhamu*.

Note 98

- 1 (1881) 6 Bom 81 (82), *Manohar v. Gebiappa*.
2. (1934) A I R 1934 Pat 199 (199) : 151 Ind Cas 375 : 13 Pat 5, *Manogi Lal Sah v. Jag Sah*.

See also the undermentioned cases.³

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99. "Application to take some step-in-aid of execution."— Under clause 5 of the Article, the person entitled to the execution of the decree or order gets a fresh starting point not only from the date of the final order on an application *for execution*, but also from the date of the final order on an application *to take a step-in-aid of execution* of the decree. In order, however, that the decree-holder may get a fresh starting point under the latter head, it is essential that—

1. The step asked for should be in *furtherance of execution* of the decree. (See Note 100.)
2. The application must be *in accordance with law and to the proper Court*. (See Note 101.)
3. The step must be one to be taken by the *Court*. (See Note 102.)
4. There should be an *application* for such step. (See Note 103.)
5. The step asked for must be in aid of a *British Indian Court* (See Note 107.)
6. The step must be with reference to the decree *sought to be executed* and not to some other matter. (See Note 108.)

100. *The step must be in furtherance of execution.*— The words "step-in-aid" must be liberally construed.¹ But it is essential that the step contemplated should be in *furtherance* of the execution of the decree.² Unless therefore the step asked for *advances*

3. (1915) A I R 1915 Low Bur 103 (103) : 42 Ind Cas 100, *Curpen Chetty v Ana Mahalingam*. (Suit against A—Attachment before judgment—Attachment removed on B executing a bond as surety for the decree amount—Suit then transferred to another Court and decreed by such Court—Application for execution against surety to latter Court not one made to proper Court—The reason apparently is that as the bond by the surety was executed to the Court wherein the suit was first instituted, that Court was the proper Court wherein to apply for execution against the surety.)

(1929) A I R 1929 Mad 787 (789) 119 Ind Cas 398, *Govindarao v. Jagannadham* (Additional District Munsif ordered by proceeding under Madras Civil Courts Act, S 11, not to receive execution application—Decree by Additional District Munsif—Execution applications filed in Principal District Munsif's Court are steps-in-aid.)

Note 100

1. (1915) A I R 1915 Mad 314 (315) 25 Ind Cas 58, *Deswreddi Yellamander v. Chinna Pitchiah*.

(1936) A I R 1936 Mad 118 (119) 159 Ind Cas 544 : 59 Mad 424, *Union Board, Pentapadu v. Srinivasacharyulu*.

2 (1903) 80 Cal 761 (772) . 8 Cal W N 251, *Trylokhyanath Bose v Jyoti Prakash Nandi*.

(1936) A I R 1936 Mad 118 (119) 159 Ind Cas 544 59 Mad 424, *Union Board, Pentapadu v. Srinivasacharyulu*.

(1931) A I R 1931 Cal 719 (725) 184 Ind Cas 922 59 Cal 760 (F B), *Amar Krishna v. Jagat Bandhu*.

(1896) 22 Bom 340 (343), *Dapuchand v. Muguttrao*.

(1889) 12 All 399 (403) . 1890 All W N 125 (F B), *Sujan Singh v. Hira Singh*.

(1937) A I R 1937 Lah 404 (407) 178 Ind Cas 185, *Jodh Singh v. Bhagwan Das Nanak Chand*.

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or *further* execution of the decree to some extent, it cannot be held to be a step-in-aid of execution.³ The question whether a particular proceeding is, or is not a step-in-aid of execution depends largely upon the circumstances of the particular case. If the facts show that the proceeding has the effect of facilitating or advancing the execution to any extent or removing some obstacle from the way of execution, it may well be regarded as a step-in-aid of execution.⁴

There is a difference of opinion as to whether, in order to constitute a step a step-in-aid of execution, it is necessary that an execution application should already be *pending*, which it is intended to be aided. In *Chowdhry Paroosh Ram Das v. Kali Puddo Banerjee*,⁵ it was held that an application for execution is an application to set the Court in motion to execute a decree in any manner prescribed by law, and that, having so set the Court in motion, "any further application during the continuance of the same proceeding is an application to take some step-in-aid of execution within the terms of clause 4 in the last column of Article 179 Schedule 2 of the Limitation Act." In *Kuppusami Chettiar v. Rajagopala Iyer*⁶ it was observed "A man cannot be said to take some step in aid of a petition which has not been initiated." In *Abdul Karim Saheb v. Lakshmanaswami*,⁷ it was held that apart from a few exceptions, an application to take a step-in-aid of execution necessarily presupposes a pending application for execution. See also the undermentioned cases⁸ to a similar effect. The general trend of opinion, however, including that of the High Court of Madras, is that it is *not* necessary that an application for execution should be pending before an application can be regarded as one to take a step-in-aid of execution.⁹

3. (1931) A I R 1931 Lah 81 (82) : 131 Ind Cas 100 : 12 Lah 153 (F B), *Ghannaya Lal v. Nathu Ram*.

(1892) 20 Cal 255 (259), *Abdul Hussem v. Fazilun*. (Application by decree-holder for release of portion of attached property and striking off an execution case is not a step-in-aid.)

(1911) 10 Ind Cas 182 (183) : 14 Oudh Cas 124, *Juggi Lal v. Ganga Prasad*. (Ordinary applications supplementary to an application for execution are not in themselves applications to take steps-in-aid.)

4. (1932) A I R 1932 Oudh 148 (149) : 137 Ind Cas 768 : 7 Luck 590 (F B), *Ram Bharose v. Ramman Lal*.

5. (1889) 17 Cal 53 (57).

6. (1922) A I R 1922 Mad 79 (81) : 70 Ind Cas 324 : 45 Mad 466.

7. (1928) A I R 1928 Mad 440 (444) : 112 Ind Cas 86.

8. (1919) A I R 1919 Mad 220 (221) : 52 Ind Cas 765, *Balasubramania v. Chitt Company Yela Nidhi Ltd.*

(1925) A I R 1925 Mad 703 (704) : 87 Ind Cas 989, *Balagurusami v. Guruswami*.

(1926) A I R 1926 Mad 1178 (1182) : 98 Ind Cas 156 : 50 Mad 49, *Krishna Pattar v. Sitarama Pattar*.

9. (1938) A I R 1938 Nag 191 (192) : 174 Ind Cas 243, *Tanba Yadorao v. Chandrasankar*.

(1938) A I R 1938 All 210 (211) : I L R 1938 All 342 : 175 Ind Cas 136 : *Latafat Ali Khan v. Kalyan Mal*.

(1917) A I R 1917 Pat 654 (655) : 39 Ind Cas 101, *Mt. Phul Koeri v. Bajorang Ram*.

Where the execution of the decree is itself barred by limitation, there can be no step-in-aid of execution. As stated by their Lordships of the Calcutta High Court, "a step-in-aid of execution can only be taken in the course of an execution proceeding which is pending or *capable of being kept alive*, and there can be no step-in-aid of execution where the execution itself is already barred."¹⁰

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101. Application for step-in-aid must be one in accordance with law and to the proper Court. — The phrase "in accordance with law" is adjectival, not only to the words "to the proper Court for execution," but also to the words "to take some step in aid of execution" In *Bhagwan Jethiram v. Dhondi*,¹ the High Court of Bombay observed: "We think that ordinary syntax would treat the phrase as adjectival to both and that the reason of the law would acquiesce in this view of the meaning." See also the undermentioned cases² to the same effect. As to the meaning of the words "in accordance with law," see Note 52, *ante*.

The application for step-in-aid must also, in order to save time, be made to the *proper Court*.³ Where a decree-holder remitted by postal money order to the Superintendent of Jail, subsistence allowances necessary for the detention of the judgment-debtor in jail, it was held by a single Judge of the High Court of Madras that the remittances must not only be considered to be applications, but also that they were made to the *proper Court* within the meaning of

(1934) A I R 1934 Mad 392 (394) . 57 Mad 608 . 150 Ind Cas 113, *Carichan v. Khunhamu*.

(1922) A I R 1922 Mad 247 (248) . 45 Mad 202 . 70 Ind Cas 333, *Sankara Nannar Pillai v. Puthia Veetil Thangamma*.

(1928) A I R 1928 Lah 7 (9) . 111 Ind Cas 259, *Ghanayalal v. Punjab National Bank Ltd*

(1938) A I R 1938 Lah 326 (327) . 178 Ind Cas 202, *Uttarchand Kapur & Sons v. Sayed Hameed*. (17 Cal 53 held no longer good law)

¹athon-

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10. (1931) A I R 1931 Cal 719 (725) . 134 Ind Cas 922 . 59 Cal 760 (F B), *Amar Krishna v. Jagat Bhandu*.

Note 101

1. (1898) 22 Bom 83 (85)

2. (1923) A I R 1923 Oudh 9 (19) . 69 Ind Cas 600 . 26 Oudh Cas 71, *Sheo Ram*

(1933) A I R 1933 Sind 341 (343). 27 Sind L R 14 . 147 Ind Cas 470, *Devraj v. Fatehchand*

3. (1917) A I R 1917 Mad 257 (257, 258) . 35 Ind Cas 237, *Penugonda Rattam v. Korasika Thatha*.

(1891) 6 Bom 31 (32), *Manohar v. Gebiapa*

(1938) A I R 1938 Lah 451 (452) . 177 Ind Cas 493, *Firm Abdur Rahim-Mohammad Gultar v. Firm Fate Mohammad Din Mohammad*.

(1913) 20 Ind Cas 252 (252) . 37 Bom 559, *Murgeppa Madivallappa v. Basawantrao Khalisappa*

that consequently it was not a step-in-aid of execution⁵ It was not considered whether the grant of time which was prayed for was itself a step-in-aid of execution or not. In the undermentioned case⁶ it was held by a single Judge of the Allahabad High Court that a step-in-aid of execution must be an act to be done by the decree-holder *in Court*, and that a certification of a payment made by the judgment-debtor to the decree-holder *out of Court* was not a step-in-aid of execution. The reasoning that it is not a step-in-aid of execution *by reason of the fact* that the payment was made *out of Court* does not seem to be correct.

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Notes 102-103

103. There should be an application. — In order to give a fresh starting point under clause 5, it is not only necessary that the step-in-aid of execution asked for must be a step to be taken by the *Court*, but also that there should be an *application* to the Court for that purpose.¹ It is really the vigilance of the party in making the

5. (1933) A I R 1933 Mad 675 (676) : 145 Ind Cas 933, *Ramaswami Chetty v. Palanisappa Chetty*.

6 (1933) A I R 1933 All 49 (49) : 143 Ind Cas 324, *Jas Karan v Nanak Shahs*.

Note 103

1. (1933) A I R 1933 Mad 83 (84, 85) : 140 Ind Cas 498 • 56 Mad 320, *Rajeswara Sethupathi v. Kuppuswami Pillai*.

(1925) A I R 1925 Lah 233 (235) : 78 Ind Cas 241, *Firm Sherumal-China-Mal v. Fim Hira Lal-Anant Ram*

(1931) A I R 1931 Lah 81 (81, 82) : 131 Ind Cas 100 : 12 Lah 153 (F B), *Ghanaya Lal v. Nathu Ram*.

(1913) 18 Ind Cas 236 (237) (Lah), *Wali Ram v. Bhagwan Das*.

(1924) A I R 1924 Mad 906 (907) 82 Ind Cas 497, *Arunachalam Chettiar v. Lakshmanan Chettiar*.

(1894) 20 Bom 179 (180), *Dwarhanath Appaji v. Anand Row Ram Chandra*.

(1910) 7 Ind Cas 759 (760) (All), *Bhavani Prasad v. Iftikhar Husain*.

(1908) 30 All 179 (181) 1908 All W N 74 : 5 All L Jour 258, *Sheo Prasad v. Indar Bahadur Singh*.

(1901) 25 Bom 639 (644) . 3 Bom L R 275 (F B), *Matuckchand v. Bechar*.

(1903) 13 Mad L Jour 33 (33) (N R C)

(1900) 22 All 358 (360) . 1900 All W N 108, *Thakur Ram v. Katwaru Ram*.

(1901) 1901 All W N 42 (42), *Nath Mal v Zahur Muhammad*.

(1897) 22 Bom 722 (726), *Trimbak v. Kashinath*

(1900) 1900 All W N 88 (89), *Har Sahai v. Sham Lal*.

(1933) A I R 1933 Mad 674 (674) . 147 Ind Cas 586, *Chathu Kutty v Raman*.

(1933) A I R 1933 Mad 597 (598) 144 Ind Cas 66, *Ramanathan Chettiar v. Estate Collector of Snaganga*.

(1920) A I R 1920 Cal 113 (113) . 54 Ind Cas 643, *Amritlal Mookerjee v. Hiratal Mookerjee*.

(1889) 16 Cal 747 (748), *Umesh Chunder Dutta v. Soonder Narain Deo*

(1927) A I R 1927 Pat 113 (113) . 99 Ind Cas 869 6 Pat 280, *Baldeo v. Lachman*.

(1883) 9 Cal 730 (732) 5 Shome L R 21 13 Cal L R 91, *Toree Mahomed v. Mahomed Mabood Bur*.

(1912) 13 Ind Cas 189 (189) (Cal), *Madan Mehan Dey v. Ganga Chandra Roy*.

(1924) A I R 1924 Oudh 281 (232) . 73 Ind Cas 211, *Mahomed Aliam v. Bachchu*.

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Note 103

application that gives him the benefit of a fresh starting point.^{1a} But an application made for a purpose for which *no such application is necessary* under the law, cannot furnish a fresh starting point.^{1b} Thus, an application asking the Court to confirm an execution sale under Order 21 Rule 92 of the Code of Civil Procedure will not furnish a fresh starting point of limitation.² Similarly, where an application is made for a particular relief and has been ordered, a repetition of the application subsequently, which is unnecessary, will not give a fresh starting point.³ So also an application for the amendment of an execution application which is already in proper form cannot be said to be a step-in-aid of execution.⁴

There is no form prescribed for an application to take a step-in-aid of execution.⁵ The question whether a particular act or

(1926) A I R 1926 Cal 879 (880) : 94 Ind Cas 44, *Jadu Nath Singha v. Krishna Rangini Dassya*. (Issue of notice under O. 21 R. 66, Civil Pro. Code, to the judgment-debtor in order that he might be present to assist the Court in drawing up the sale proclamation, not on the motion of the decree-holder, but of its own accord is not a step-in-aid of execution. Nor does the swearing in of an affidavit by the decree-holder's identifier to the effect that the notice had been served, unaccompanied by any application, oral or written, give a fresh start to limitation.)

[See also (1909) 3 Ind Cas 336 (337) (Cal), *Raj Behari v. Kali Har Gupta*.]

1a. See also (1866) 5 Suth W R Misc 43 (43), *Hemraj Chowdhry v. Asoodun*. (The act which the law requires one man to do to save his limitation as to his decree of one date and character, cannot be considered the same act which another is required to do to save his limitation in respect to that other man's decree of a totally different date and character.)

1b. (1904) 31 Cal 1011 (1018) : 9 Cal W N 193, *Umesh Chandra Dass v. Shb Naram Mondul*.

(1918) A I R 1918 Mad 620 (622) : 41 Mad 251 : 41 Ind Cas 701, *Maslamans Mudahar v. Sethuswami Aiyar*.

(1886) 12 Cal 441 (444), *Rajkumar Banerji v. Rajlal, Dabi*. (Order of Court which requires no application does not give starting point.)

(1922) A I R 1922 Mad 30 (31) : 70 Ind Cas 80, *Krishna Aiyer v. Mayankutti*.

(1937) A I R 1937 Rang 406 (407) : 172 Ind Cas 775, *Ko Po Sheen v. M. J. Keekeebhai & Co*.

[But see (1927) A I R 1927 Oudh 134 (134, 135) : 100 Ind Cas 303 : 2 Luck 419, *Ramlal v. Udit Naram Singh*.

(1901) 29 Cal 580 (583), *Jagannath Khan v. Brojonath Pal*.]

2. (1901) 31 Cal 1011 (1018) : 9 Cal W N 193, *Umesh Chandra Dass v. Shb Naram Mondul*.

(1870) 13 Suth W R 315 (315), *Mullick Enaet Ali v. Wahed Ali*.

(1881) 10 Cal L R 330 (330), *Motendro Chandra Ghose v. Mohendro Nath Ghose*.

(1868) 9 Suth W R 100 (101), *Juggut Mohinte Dubee v. Ramchand Ghose*.

(1867) 8 Suth W R 359 (360), *Maharaja of Burdwan v. Luckee Monsee Debee*.

(1869) 11 Suth W R 117 (117) : 2 Beng L R A C 235, *Shib Ram Dev v. Banee Madhub Mitter*.

3. (1920) A I R 1920 Mad 86 (87) : 58 Ind Cas 536, *Rangachariar v. Subramanias Chetty*. (A I R 1918 Mad 620, Referred to.)

4. (1930) A I R 1930 Cal 804 (305) : 124 Ind Cas 830, *Hatimullah v. Sukhamoy Chaudhury*.

5. (1932) A I R 1932 Pat 309 (311) : 11 Pat 785 : 142 Ind Cas 155, *Sital Prasad Shukul v. Dabu Lal Shukul*.

proceeding amounts to an application depends upon the facts and circumstances of each case.⁶ The Article must be construed so as to prevent, as far as possible, the defeat of *bona fide* endeavours of the decree-holder to secure the fruits of the decree.⁷ The word "application" has therefore been liberally construed as including any document containing a request.⁸ It is not necessary that the application should be in writing unless required by the Code.⁹ It may be *oral*.¹⁰ Where the facts and circumstances raise the pre-

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(Clause 8)
Note 103

6. (1925) A I R 1925 All 391 (395) : 88 Ind Cas 271 : 47 All 667, *Raghunath Prasad Singh v. Lachhmi Narain Singh*.
7. (1882) 5 Mad 141 (142, 143), *Kunhi v. Seshagari*.
8. (1923) A I R 1923 Oudh 9 (13) : 69 Ind Cas 660 : 26 Oudh Cas 71, *Shao Ram v. Ram Bharosey*. (In so far as these decisions suggest that an application means a document, they cannot however be accepted as correct.)
- (1930) A I R 1930 Oudh 468 (470, 471) : 128 Ind Cas 728, *Hasan Shah v. Mohammad Amir Mirza*. (Do)
9. (1922) A I R 1922 Mad 30 (31) : 70 Ind Cas 60, *Krishna Aiyar v. Veetil Mayyankutti*.
- (1934) A I R 1934 Bom 266 (272) : 151 Ind Cas 767, *Gopal Shankar v. Raising Premji*.
- (1919) A I R 1919 Oudh 375 (376) : 22 Oudh Cas 75 : 52 Ind Cas 116, *Gulzari Lal v. Ram Bhajan*.
- (1914) A I R 1914 Mad 384 (384) : 23 Ind Cas 530 : 38 Mad 695, *Abdul Kadir Bowther v. Krishna Malamal Nair Karnatan*.
- (1929) A I R 1929 Rang 152 (153) : 7 Rang 132 : 117 Ind Cas 578, *Somasundaram Chettyar v. Ma Shwe Thit*.
- (1897) 22 Bom 722 (725, 726), *Trimbak v. Kashinath*.
- (1918) A I R 1918 Mad 620 (621) : 41 Mad 251 : 41 Ind Cas 701, *Masilamani Mudaliar v. Sethuswami Aiyar*.
- 10 (1927) A I R 1927 Oudh 134 (134) : 2 Luck 419 : 100 Ind Cas 308, *Ram Lal v. Udit Narain Singh*.
- (1923) A I R 1923 Nag 11 (11) : 67 Ind Cas 899, *Narayan Rao v. Balakrishna*.
- (1925) A I R 1925 Bom 443 (443) : 89 Ind Cas 228, *Mulchand Manajy v. Jamanbhai Abdul Kabir*.
- (1914) A I R 1914 Mad 384 (385) : 38 Mad 695 : 23 Ind Cas 533, *Abdul Kadir Bowther v. Krishna Malamal Nair Karnatan*.
- (1880) 3 All 139 (140) : 5 Ind Jur 430, *Amar Singh v. Tula*.
- (1882) 1882 All W N 169 (169), *Khawan Singh v. Daya Ram*.

s 114, *Hanu-*

- (1917) A I R 1917 Pat 698 (699) : 38 Ind Cas 540, *Surajmal v. Sarjoog Prasad Singh*.
- (1925) A I R 1925 Oudh 453 (454) : 88 Ind Cas 232, *Pirthi Nath v. Ram Saran*.
11. (1925) A I R 1925 Bom 443 (443) : 89 Ind Cas 228, *Mulchand Manajy v. Jamanbhai Abdul Kabir*.
12. (1924) A I R 1924 Mad 186 (186) : 76 Ind Cas 769, *Lakshmi Narasa Raju v. Ganganna*.
- (1932) A I R 1932 Oudh 148 (150) : 137 Ind Cas 768 : 7 Luck 590 (F B), *Ram Bharose v. Ramman Lal*.
- [See also (1918) 18 Ind Cas 236 (236, 237) (Lah), *Wali Ram v. Bhagvan Das*.

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(Clause 5)
Notes 103-104

order made is of such a nature that, without an application the Court would not have made it, an application would be presumed to have been made.¹³

The application for step-in-aid need not be *bona fide*.¹⁴

104. Plaintiff, if can be treated as an application.—There is a conflict of opinion as to whether a suit filed for a declaration that certain property is liable to be proceeded against in execution of the decree, can be considered to be an application within the meaning of this Article. Under the Code of 1859 such a suit was held to save time as being “some proceeding” to keep the decree in force.¹⁵ In *Raghunandun Pershad v. Bhugoo Lall*,¹ it was held by the Calcutta High Court that the Limitation Act draws a clear distinction between suits and applications and that a plaintiff in a suit such as that above-mentioned could not be said to be an application within the meaning of this Article. In *Kuppuswami v. Rajagopala*,² it was held by the High Court of Madras that a suit under Section 53 of the Transfer of Property Act to set aside an alienation by the judgment-debtor as being fraudulent, could not be treated as an application to take a step-in-aid of execution of the decree which would give a fresh starting point of limitation for a subsequent application for execution against the moveable property of the judgment-debtor. According to the Chief Courts of Oudh³ and the Punjab,^{3a} a suit for a declaration

(1927) A I R 1927 Pat 323 (324) : 103 Ind Cas 37, *Kara Fasi v. Ram Nath Singh*]

13. (1913) 19 Ind Cas 394 (395) (Bom), *Chinnappa Karbasappa v. Ladasahab Babasahab*.

(1928) A I R 1928 Cal 302 (302) : 109 Ind Cas 588, *Mohan Lal v. Kasimuddin*.

(1919) A I R 1919 Low Bur 117 (118) : 52 Ind Cas 656: 10 Low Bur Rul 34, *Adimuthu Pillai v. Adiappa*.

(1918) A I R 1918 Nag 94 (95, 96), *Laxmi Narayan v. Bhicraj*.

14. (1868) 4 Mad H C R 75 (76), *Konda Raju Venkata Subbaya v. Ramakrishnamma*.

(1934) A I R 1934 P C 14 (16) : 55 All 993 (1000, 1001) 61 Ind App 62 : 147 Ind Cas 323 (P C), *Khalil-ur Rahman v. Collector of Etah*.

[See also (1929) A I R 1929 All 625 (630) : 118 Ind Cas 17 : 52 All 11, (F B), *Kayastha Co. Ltd v. Sita Ram Dubey*.]

Note 104

1a(1867) 8 Suth W R 99 (99), *Akbur Gasee v. Bibee Nufeezun*.

1. (1869) 17 Cal 268 (271, 272).

2. (1922) A I R 1922 Mad 79 (81) : 45 Mad 466 : 70 Ind Cas 324.

3. (1923) A I R 1923 Oudh 9 (14) : 69 Ind Cas 600 : 26 Oudh Cas 71, *Sheo Ram v. Ram Bharosey*.

(1930) A I R 1930 Oudh 468 (470) : 128 Ind Cas 728, *Hasan Shah v. Mohammad Amir Mirza*.

(1936) A I R 1936 Oudh 248 (249, 250) : 160 Ind Cas 465 : 11 Luck 716, *Rudra Narain v. Maharaja of Kapurthala*.

(1935) A I R 1935 Oudh 490 (492) : 155 Ind Cas 505 : 11 Luck 266, *Khashi Ram v. Ram Sumer*. (Suit in Court different from executing Court—No fresh starting point.)

3a(1875) 1875 Pun Re No. 5, *Delhi and London Bank v. Captain A. H. Plowden*.

that certain properties are liable to be proceeded in execution of the decree, can be treated as an application to take a step-in-aid of execution provided it is filed in the Court whose duty it is to execute the decree. The decisions proceed on the view that clause 5 does not use the word "application" in any restricted sense or in antithesis to a "plaint" or any other document such as a memorandum of appeal, but merely in the sense of a document containing a request. The High Courts of Nagpur and Allahabad have held that such a suit cannot be treated as an application.⁴ It is submitted that the view of the Chief Courts of Oudh and Punjab stated above is not correct. Section 2 sub-section 10 *ante* provides that a "suit" does not include an appeal or an application. The First Schedule of the Act deals separately with "suits," "appeals" and "applications." To construe the word "application" in clause 5 as including a "suit" would seem to be an obvious disregard of the intention of the Legislature.

105. Appeal, whether can be treated as an application.— There is also a difference of opinion on the question whether an appeal by the decree-holder against an order affecting the execution of his decree can be considered to be an application to take a step-in-aid of execution. It has been held in the undermentioned cases¹ that an appeal by the decree-holder to the Appellate Court cannot be held to be an application to the *proper Court* to take a step-in-aid of the execution of the decree. (See also Note 93, *ante*.) A contrary view, namely that an appeal by the decree-holder would be an application to take a step-in-aid of execution of the decree, has been taken in the undermentioned cases.² It is submitted that this view cannot be supported on principle. The decisions have not considered the aspect that obviously the Appellate Court is a Court different from the Court whose duty it is to execute the decree and is therefore not a proper Court. The question whether an appeal is an application really does not arise at all under this clause.

106. Application for review of order in execution.— An application for review of an order "striking off" an execution case and for its restoration to the file, has been held to be an application to take a step-in-aid of execution within the meaning of this clause.¹

4. (1938) A I R 1938 Nag 534 (535, 537), *Rajaram v Pasku*.

(1887) 1887 All W N 193 (198), *Madho Rai v Rajkari Kuar*.

Note 105

1. (1901) 26 All 608 (610) 1901 All W N 193 1 All L Jour 336, *Nand Kishore v. Sipahi Singh*

(1923) A I R 1923 Bom 431 (431) 73 Ind Cas 1030 47 Bom 783, *Govinddas Rajaram v Ganpat Das Narottam*

(1924) A I R 1924 Cal 419 (419) 74 Ind Cas 379, *Rajani Bandhu v Kali Prasanna*.

2 (1901) 4 Oudh Cas 333 (339), *Ujagar Lal v. Shankardayal*.

(1921) A I R 1921 All 174 (175) 64 Ind Cas 593, *Baldeo Singh v. Ramsarup*

(1914) A I R 1914 Bom 247 (247) 39 Bom 20 26 Ind Cas 263, *Laxmiram Lallubhai v. Bhalshankar Venuram*.

Note 106

1. (1900) 27 Cal 285 (288), *Kartick Nath Pandey v. Juggernath Ram Marwari*.

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Notes 106a-109

106a. Re-submission of a returned application. — Where an application for execution is returned for amendment and is subsequently re-submitted after compliance with the order of the Court, the act of re-submission cannot be considered to be an application for a step-in-aid within the meaning of this Article.¹

107. The step asked for, whether should be in aid of a British Indian Court.—It has been held by a Full Bench of the High Court of Madras that the step asked to be taken by the Court must be a step-in-aid of the execution by a British Indian Court, and that consequently an application to a British Indian Court asking it to send the papers to the Court of Native State for execution there is not a step-in-aid of execution within the meaning of clause 5 so as to give a fresh starting point for a subsequent application in the British Indian Court.¹ A Bench of the Punjab Chief Court has also held that the words "step in aid of execution" refer to steps in aid of the execution of the decree which may be taken under the Code of Civil Procedure or any other provision of law in force in British India regulating the execution of decrees, and that an application to a British Indian Court to transfer the decree to a foreign Court for execution there according to the laws of the foreign State, is not an application for a step-in-aid of execution within the meaning of this Article.² The High Court of Bombay has, on the other hand, taken a contrary view, namely, that such an application would be a step-in-aid of execution within the meaning of this Article. According to that High Court, the word "execution" is a word of general meaning and is not confined to execution authorized only by the Civil Procedure Code; it would include execution which under agreement between the foreign States and the British Government, a foreign Court is entitled to levy.³

108. The step must be with reference to the decree sought to be executed. — The step which is requested to be taken must be in furtherance of the decree sought to be executed and not to other matters. Thus, where costs are incurred in the course of execution proceedings and applications are made for the recovery of such costs, they cannot be considered to be applications to take steps-in-aid of the execution of the *decree* itself.¹

109. Application for execution, not in accordance with law, may still be regarded as application for step-in-aid. — An application merely to *execute* the decree cannot be considered to be

Note 106a

1. (1909) 4 Ind Cas 1131 (1134) (Mad), *Raja Rathna Karundan v. Dorasami*.

Note 107

1. (1918) A I R 1918 Mad 580 (584) : 40 Mad 1069 : 42 Ind Cas 231 (F D), *Pierce Leslie & Co. Ltd. v. Perumal*
 2. (1881) 1881 Pun Re No. 107, *Saadat Ali Khan v. Muhammad Ali Khan*.
 3. (1918) A I R 1918 Bom 236 (237) : 42 Bom 420 : 46 Ind Cas 56, *Jenardn Goind v. Narayan Krishnaji*.

Note 108

1. (1901) 24 Mad 672 (674), *Appu Rao v. Ramaiah & Chettiar*.

an application to take a step-in-aid of execution.¹ But, where an application for execution contains prayers for the execution of the decree and also for certain matters which would be steps-in-aid of the execution, the application, though it may fail to be in accordance with law as an application for execution, may still be regarded as an application in accordance with law to take a step-in-aid of execution of the decree.² In *Sadaya Chandra v. Pares Nath*,³ an application which was defective in material particulars as an application for execution contained prayers that the applicant, a legal representative of the decree-holder, might be permitted to proceed with the execution. It was held by the High Court of Calcutta that the application, though not in accordance with law as an application for execution, was yet an application in accordance with law to take a step-in-aid of execution.

110. Application for step-in-aid does not lie where execution is barred.—An application for a step-in-aid of execution can only be taken where either an execution application is pending or the decree is capable of being kept alive. Where the execution of the decree is barred by limitation and the decree thus ceases to be capable of being kept alive, there cannot be any step-in-aid of execution subsequently which would enable the decree to be executed.¹

111. Application for order absolute or for final order.—Before the Civil Procedure Code of 1908, proceedings to obtain an order absolute for sale or foreclosure were regarded as proceedings in execution. An application for an order absolute for sale under Section 87 of the Transfer of Property Act or for foreclosure under Section 89 of the said Act was held to be one to take a step-in-aid of execution.¹

(1926) A I R 1926 All 440 (444) 48 All 377 94 Ind Cas 961, *Nandlal Saran v. Dharam Kirti Saran*

Note 109

1. (1928) A I R 1928 Mad 440 (442) . 112 Ind Cas 36, *Abdul Karim Sahib v. Lakshmanaswami*.
2. (1922) A I R 1922 Cal 44 (45) 64 Ind Cas 571, *Sadaya Chandra Jana v. Pares Nath Ghose*.
- (1927) A I R 1927 Bom 52 (52, 53) 98 Ind Cas 941, *Birdichand v. Badesahab*.
- (1930) A I R 1930 Bom 65 (66) 122 Ind Cas 856, *Gopalrao v. Hari* (Application for execution without inventory of property may be regarded as step-in-aid of execution.)
- (1905) 28 Mad 537 (539), *Pachappa Isari v. Poojab Seeran*.
- (1912) A I R 1912 Pat 286 (288) 11 Pat 513 : 139 Ind Cas 843, *Sheshayyer v. Madanmohan*
3. (1922) A I R 1922 Cal 44 (45) 64 Ind Cas 571

Note 110

1. (1931) A I R 1931 Cal 719 (725) 59 Cal 760 134 Ind Cas 922 (7 B), *Amar Krishna Chaudhury v. Jagat Bandhu Biswas*

Note 111

- 1 (1892) 1892 All W N 5 (5), *Ram Krispal v. Sheo Sahai*
- (1920) A I R 1920 Mad 296 (298) 56 Ind Cas 563, *Ganpathia Pillai v. Gopala Iyer*

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Notes 111-113

Under the Code of Civil Procedure, 1908, an application for a final decree for sale or for foreclosure is an application in the suit and not for the execution or to take a step-in-aid of the execution of any decree.² So also an application for a final decree in a *partition* suit is not one to take a step-in-aid of execution.³

Suppose now that in a case where a final decree has *already* been passed the decree-holder, under a mistaken view, applies for final decree. Can such an application be treated as one to take a step-in-aid of the execution of the decree? It has been held by the High Court of Lahore that it cannot be so treated, the reason being that the decree-holder contemplated by such application merely a step to further his *suit* and not the *execution* of any decree.⁴ The High Court of Madras has, on the other hand, held that the decree-holder must be regarded, by such application, to have endeavoured to get an order which he thought was necessary before executing the decree, that the ultimate object of the application was to hasten the actual realisation of the decree amount, and that, as such, the application was a step-in-aid of execution.⁵ According to the High Court of Bombay, there is no rigid rule to be laid down in such cases and that such applications may, in some cases, be regarded as being steps-in-aid of execution, although in other cases they may not be so regarded.⁶

112. Application to appoint a receiver.—An application by the decree-holder for the *appointment* of a receiver is an application to take a step-in-aid of execution.¹ An application by the decree-holder praying that the receiver who has been appointed in execution proceedings should pay money to him, is also one to take a step-in-aid of execution.²

113. Application for succession certificate.—An application to obtain a succession certificate is not one to execute a decree. It is also not an application to take a step-in-aid of execution.¹ The

2. (1923) A I R 1923 Mad 33 (39) : 106 Ind Cas 395, *Kunhammad Haji v. Koshuvammal*.

3. (1921) A I R 1921 Bom 260 (261) : 45 Bom 952 : 61 Ind Cas 159, *Dayabhai Chundul v. Bas Ujam*.

4. (1933) A I R 1933 Lah 117 (118, 119) : I L R (1937) Lah 671 : 175 Ind Cas 846, *Jodh Singh v. Firm Bhagwan Das*.

5. (1928) A I R 1928 Mad 33 (39) : 106 Ind Cas 395, *Kunhamad Haji v. Koshuvammal*.

6. (1924) A I R 1924 Bom 71 (72) : 79 Ind Cas 407, *Bindhu Gorind v. Hanmat Gorind*.

[See also (1922) A I R 1922 Bom 95 (95) : 46 Bom 761 : 67 Ind Cas 153, *Hirachand Khemchand v. Aba Lala Patil*.]

Note 112

1. (1929) A I R 1929 Lah 57 (58) : 113 Ind Cas 909, *Ghannaya Lal & Co. v. Jassa Ram Hiranand*.

(1909) 5 Ind Cas 758 (759) (Mad), *Sambasiva Mudali v. Krishnan*.

2. (1916) A I R 1916 Pat 56 (56) : 42 Ind Cas 802, *Raghunandan Singh v. Jugal Kishore Trigunait*.

Note 113

1. (1913) 20 Ind Cas 252 (252) : 37 Bom 559, *Murgeppa Madivalappa v. Basavantrao Khalilappa*.

reason is that it is perfectly independent of, and has nothing to do with the execution of a decree, although the ultimate object of it may be to use the certificate in furtherance of execution. It is impossible to say that the application to get the certificate is an application to the proper Court to take some step-in-aid of execution within the meaning of clause 5, Article 182. The words "proper Court" in the Article also tend to support this conclusion. An application to obtain a succession certificate may be made in one of several Courts. Obviously, it could not be such an application as clause 5 Article 182 contemplates.²

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(Clause 5) .
Notes 113-115

114. Application for confirmation of sale.—It has been seen in Note 103 *ante*, that an application for a purpose for which no application is necessary under the law cannot furnish a starting point of limitation. A Court is bound to confirm a sale under Order 21 Rule 92 of the Code of Civil Procedure, where no application has been made under Rules 89, 90, 91 of the same Order. An application made in such a case praying that the Court might confirm the sale will not be an application to take a step-in-aid of execution of the decree within the meaning of clause 5.¹ Nor will the *order* of the Court confirming the sale without any application save time.²

115. Application for postponement of execution proceedings.—There is a difference of opinion on the question whether an application for the postponement of execution proceedings is an application for a step-in-aid of execution. The general trend of opinion in the High Court of Madras is that such an application is not one to take a step-in-aid of execution. Thus, an application for time to enable the decree-holder to file the necessary encumbrance

[See also (1868) 4 Mad H C R 148 (149), *Virabhadra Rau v. Ramaiya*
(1868) 4 Mad H C R 89 (90), *Lakshammamma v. Venkataraj Gava-chariar*.]

2. (1913) 20 Ind Cas 252 (253) · 37 Bom 559, *Murgeppa Madiwallappa v. Basawantrao Khalilappa*.

Note 114

1. (1904) 31 Cal 1011 (1013) · 9 Cal W N 193, *Umesh Chandra v. Shub Narain*.
(1910) 6 Ind Cas 264 (264) (Cal), *Panchanan Chowdhry v. Nrsingha Prasad Roy*.
(1923) A I R 1923 Pat 22 (22, 23) · 2 Pat 249 : 72 Ind Cas 938, *Triloke Nath Jha v. Bansman Jha*.

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(1869) 11 Suth W R 117 (117) · 2 Beng L R A C 235, *Shub Ram Dey v. Banee Madhub Mitter*.

(1870) 13 Suth W R 38 (39) 4 Beng L R A C 115, *Maharajadhiraj Mahatab Chund Bahadur v. Ram Brahma Mullick*.

[See also (1868) 10 Suth W R 224 (224) 12 Bom L R 506 (Note), *Gunga Bishen Chund v. Maharajadhiraj Mahtab Chand Bahadur*.]

[But see (1872) 13 Suth W R 156 (157), *Gobind Chunder Chowdhury v. Juhoorul Nissa Bibee*.]

certificate,¹ or to apply for substituted service,² is not a step-in-aid of execution. In *Balasubramania Pillai v. T. A. B. Chit Company*,³ where an application which was defective had been returned for correction and the decree-holder applied for extension of time to carry out the correction, it was held that the application was not one to take a step-in-aid of execution, inasmuch as there was no previous application for *execution pending* when the application for time was made. As to the correctness of this reasoning, see Note 100 *ante*. In *Sankaran Nair v. Puthiya Veetil Thangamma*,⁴ where a mortgagor applied for extension of time to pay money due under a decree for redemption which also provided for sale on default, it was held that the application was one to take a step-in-aid of execution of that portion of the decree which related to redemption.

Note 115

(1926) A I R 1926 Mad 1197 (1198) : 98 Ind Cas 163, *Katifi Muhammad Hamiduddin v. Muhammad Ghose*.

(1931) *Hamiduddin v. Muhammad Ghose.* *11 M.L.J. 101.*

[illegible]

(1914) A I R 1914 Mad 685 (1939). See also 685 (1939).
Pandala Muthial Nadu. (A I R 1914 Mad 881, Followed.
 This case has been dissented from in A I R 1929 Mad 143.)

2. (1933) A I R 1933 Mad 675 (676, 677) : 145 Ind Cas 933, *Ramaswamy Chetty v. Palaniappa Chetty*.

3. (1919) A I R 1919 Mad 220 (222) : 52 Ind Cas 765.

4. (1922) A I R 1922 Mad 247 (247) : 70 Ind Cas 933 : 45 Mad 202.

5. (1923) A I R 1923 Bom 461 (462) . 73 Ind Cas 1011, *Vishnu Nagappa v. Narasimha Pandurang*.

6. (1923) A I R 1923 Bom 461 (462) : 73 Ind Cas 1011, Vishnu Nagappa v. Narasinha Pandurang.

7. (1912) 17 Ind Cas 969 (969) : 37 Dom 317, *Sheshdasacharya v. Bhima-charya*.

7a(1921) A I R 1921 Bom 33 (33) 60 Ind Cas 916, *Vishvanath v. Narsu*.

A. (1912) 17 Ind Cas 30 (30) : 36 Bom 63^a, *Haridas v. Vithaldas*.

It has been held by the High Court of Calcutta that an application for time to produce evidence to prove service of notice,⁹ or a joint application by the parties reporting part satisfaction of the decree and asking for time to pay the balance of the decree amount,¹⁰ or a joint compromise reporting satisfaction of part of the decree and praying for time to have the rest of the decree executed at a future time,¹¹ is an application to take a step-in-aid of execution. The High Court of Allahabad has also taken a similar view. Thus, it has been held that an application for time for ascertaining the correct address of the judgment-debtor,¹² or for postponement of sale in execution,¹³ is one for a step-in-aid of execution. See also the undermentioned cases.¹⁴

116. Application for issue of notice under Order 21 Rule 22, Civil Procedure Code.—Clause 6 of the Article, as it stood before the amendment of the Act in 1927, provided that a fresh starting point would accrue from the date of issuing a notice under Order 21 Rule 22 of the Code of Civil Procedure. Under the Article as it stands at present, the mere issue of a notice by the Court under Order 21 Rule 22 of the Code of Civil Procedure, is not stated as a starting point of limitation. An application for the mere issue of a notice to the judgment-debtor is not contemplated by the Code and, consequently, will not be an application in accordance with law to

9. (1909) 5 Ind Cas 147 (148) (Cal), *Narsingh Dayalsingh v. Kali Charan Singh*.
10. (1893) 20 Cal 696 (698, 699), *Was Imam v. Poonst Singh*.
11. (1910) 6 Ind Cas 366 (367) (Cal), *Bundeswar Koer v. Anadhi Dehari*.
12. (1916) 4 I R 1916 All 33 (34) 38 All 690 35 Ind Cas 693, *Bhavron Prasad v. Amma Begam*.
- (1919) 4 I R 1919 All 447 (447, 448) . 50 Ind Cas 278, *Sheo Shankar Lal v. Padhe Shyam*.
- (1907) 29 All 301 (302) 4 All L Jour 181 1907 All W N 74, *Pitram Singh v. Tota Singh*.
13. (1881) 4 All 60 (63) . 1881 All W N 113, *Silla Din v. Sheo Prasad*.
14. (1929) 4 I R 1929 Lah 335 (336) 119 Ind Cas 228, *Ram Chand v. Dayal Singh Chanda Singh* (An application for extension of time in complying with the orders of the Court thereafter is a step-in-aid.)
- (1900) 27 Cal 285 (288), *Karticknath Pandey v. Juggernath Ram Marwari*. (An application for time to pay a decree amount is not a step in aid of execution.)
- (1908) 35 Cal 1060 (1063) 8 Cal L Jour 193, *Umed Ali v. Abdul Karim*. (An application for time is not a step-in-aid of execution and does not prevent subsequent applications from being barred.)
- (1928) 4 I R 1928 Cal 572 (574) 76 Ind Cas 455, *Rajendra Lal Sha v. Abdul Karim Abu Ahmed Ghusni Choudhry*. (Although an appli-

so or not is not a step-in aid of execution)

- (1930) 4 I R 1930 Mad 995 (996) 54 Mad 806 128 Ind Cas 713, *Demasikam Annamalai Desikar v. Raju Pillai*. (Where decree is passed in favour of plaintiff for recovery of property subject to payment by him of certain amount for improvement to defendant, application by plaintiff for extension of time to enable him to raise money is not step-in aid.)

Article 182
(Clause 5)
Notes 116-116a

take a step-in-aid of execution.¹ Where, however, there is an *application for execution* containing also a prayer for the issue of a notice under Order 21 Rule 22 of the Code of Civil Procedure, the application, in so far as the prayer for notice is concerned, will be an application to take a step-in-aid of execution within the meaning of clause 5 of this Article.²

There is a difference of opinion on the question whether the filing of an *affidavit of proof of service* of the notice issued under Order 21 Rule 22 of the Code can give a fresh starting point under clause 5. According to the undermentioned cases³ of the Calcutta High Court, the filing of such an affidavit must be regarded as an application to take a step-in-aid of execution. The High Court of Patna has, in one case,⁴ followed the above view of the Calcutta High Court, but in a later case⁵ has held that the question whether the filing of such affidavit would save time must depend upon the question whether an application should be presumed to have been made in the particular circumstances of the case, and that where such presumption cannot, under the circumstances, be made, the filing of the affidavit will not save time. The same view has been taken in the undermentioned case⁶ of the Calcutta High Court. According to the High Court of Bombay,⁷ an affidavit cannot, under any circumstances, be regarded as an application and cannot save time under clause 5.

116a. Application for proclamation of sale under Order 21 Rule 66, Civil Procedure Code. — An application for the issue of a proclamation of sale in respect of property already attached in

Note 116

1. (1939) A I R 1939 Mad 195 (195) : 180 Ind Cas 674, *Nagaratnam Pillai v. Ramaswami Iyer*.
- (1894) 9 O P L R 151 (16), *Rai Bahadur Mukund Balkrishna Buty v. Lakhy Mahar*.
- (1922) A I R 1222 Cal 3 (4) : 63 Ind Cas 116, *Harari Lal v. Baidyanath Saha*.
 [See however (1878) 1 All 675 (680), *Behari Lal v. Salik Ram*. (Application for mere notice without application for execution in accordance with law is a proceeding to keep the decree in force under the Act of 1871)]
- [But see (1905) 1905 Pun Re No. 22 : 1905 Pun L R No. 57 : 1905 Pun W R No. 33, *Muhammad Nawas Khan v. Ram Das*]
2. (1938) A I R 1938 Mad 553 (555) : 178 Ind Cas 525, *Subramanyam Tirumurupu v. Naraina Tirumurupu*.
 (1905) 28 Mad 557 (559, 560), *Pachaippa Achari v. Poojali Seenan*.
3. (1918) A I R 1918 Cal 227 (228) : 38 Ind Cas 535, *Pran Krishna Das v. Partab Chandra Daloi*.
- (1928) A I R 1928 Cal 302 (302) : 109 Ind Cas 688, *Mohan Lal v. Kasimuddin Sheikh*.
4. (1919) A I R 1919 Pat 424 (425) : 49 Ind Cas 892 : 4 Pat L Jour 521, *Thakur Singh v. Sheo Bhanjan Singh*.
5. (1928) A I R 1928 Pat 145 (146) : 6 Pat 691 : 103 Ind Cas 430, *Fateh Bahadur Singh v. Parmeshwar Prasad Sahu*.
6. (1920) A I R 1920 Cal 22 (24) : 54 Ind Cas 1, *Krishna Prasad Maatra v. Dharendra Nath Chakravarty*.
7. (1909) 3 Ind Cas 771 (772) (Bom), *Mohan Laldas v. Bapuji Ghelabhai*.

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Note 117

satisfaction of the decree and the decree-holder contests such application and attends Court with his witnesses or files a list of his witnesses, an application by him requesting the Court to examine those witnesses would be presumed to have been made and the implied application would be considered to be one to take a step-in-aid of execution.² An application by the decree-holder to send for certain records,³ or to summon witnesses,⁴ or to receive *batta* for summoning witnesses,⁵ for the purpose of resisting the judgment-debtor's application objecting to the execution of the decree, would be one to take a step-in-aid of execution within the meaning of this clause. It has been held in the undermentioned cases⁶ that an application by the decree-holder asking the Court to reject the objections of the judgment-debtor to the execution is a step-in-aid of execution.

Where the judgment-debtor prefers an appeal against an order passed against him in an execution proceeding, the fact that the decree-holder resists the appeal will not give him a fresh starting point under this clause.⁷

2. (1930) A I R 1930 Cal 304 (305) : 124 Ind Cas 830, *Hatimullah v. Sulhamoy Chaudhury*.

(1918) A I R 1918 Cal 976 (977) : 44 Ind Cas 604, *Brojendra Kishore Roy v. Din Muhammad Sarkar*.

(1928) A I R 1928 Pat 612 (614) : 7 Pat 708 : 113 Ind Cas 582, *Jagdeo Narain Singh v. Bhubaneswari Kuer*.

3. (1925) A I R 1925 All 394 (395) : 47 All 667 : 88 Ind Cas 271, *Raghunath Prasad v. Lachmi Narain*.

4. (1927) A I R 1927 Lah 653 (654) : 103 Ind Cas 712, *Umar Din v. Ghulam Muhammad*.

(1923) A I R 1923 All 415 (416) : 79 Ind Cas 411, *Abdul Quddus v. Sayad Ahmad Husain*.

(1922) A I R 1922 All 432 (432) : 64 Ind Cas 524, *Mahomed Siddiq Khan v. Masri Lal*.

(1910) 5 Ind Cas 292 (294) (All), *Shugan Chand v. Ramjas*.

(1883) 5 All 344 (345) : 1883 All W N 57 : 8 Ind Jur 53, *Alli Muhammad Khan v. Gur Prasad*.

(1918) A I R 1918 Cal 635 (636) : 40 Ind Cas 1005, *Kedar Nath v. Laxhi Kanta*.

(1925) A I R 1925 Pat 450 (459, 460) : 4 Pat 202 : 88 Ind Cas 807, *Sheo Sahay v. Jamuna Prasad Singh*.

5. (1934) A I R 1934 Mad 710 (710) : 58 Mad 301 : 154 Ind Cas 593, *Veerappa Setty v. Munisami Achary*. (Reversing A I R 1933 Mad 403 (405).)

6. (1918) A I R 1918 All 92 (92) : 40 All 668 : 49 Ind Cas 39, *Tamir-un-nissa Bibi v. Najju*.

(1883) 5 All 576 (577) : 1883 All W N 112, *Kewal Ram v. Khadim Husain*.

(1921) A I R 1921 All 119 (120) : 63 Ind Cas 907, *Ishri Rai v. Raghupat Narain Rai*.

(1910) 5 Ind Cas 292 (294) (All), *Shugan Chand v. Ramjas*.

(1894) 21 Cal 23 (26), *Gobind Pershad v. Runglal*.

(1928) A I R 1928 Pat 612 (613) : 7 Pat 708 : 113 Ind Cas 582, *Jagdeo Narain Singh v. Bhubaneswari Kuer*. (Application for step-in-aid need not necessarily be made in the course of execution proceedings.)

² A. C. J. 12, C. 11, D. 1, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Hari Charan Ray.

(1860) 5 Cal 595 (597), *Kristo Kumar Nag v. Mahabat Khan*.

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118. Payment of process fee, if step-in-aid. — Under the Act of 1859, an application for execution and an order to deposit *talbana* followed by the deposit of *talbana* and service of notice were held sufficient to keep the decree alive ¹

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(Clause 5)
Note 118

The mere payment of process fee on an application for execution unaccompanied by any application asking the Court to take some specific action is not a step-in-aid of execution ². But, where a *batta* memorandum is not a mere memorandum of the deposit of the *batta*, but asks for a certain process to be issued, or there are sufficient indications in the process application that the applicant in effect asked for some process to be issued, it is an application to take a step-in-aid of execution ³. It has been held by the Judicial Commissioner's Court of Nagpur that an application for issue of process to a *witness*

Note 118

1. (1866) 6 South W R M-c 74 (74), *Treelochun Chatterjee v. Radha Monee Dossee*.
2. (1908) 30 All 179 (180) 1908 All W N 74 5 All L Jour 258, *Sheo Prasad v. Indar Bahadur Singh*.
(1901) 25 Bom 639 (643) 3 Bom L R 275 (F D), *Malulchand v. Bechar Natha* (From a mere payment to the Nazir no application can be inferred.)
(1926) A I R 1926 Oudh 289 (290) 1 Luck 153 · 93 Ind Cas 631, *People's Industrial Bank, Ltd. Allahabad v. Mahesh Charan Sinha*.
(1912) 13 Ind Cas 189 (190) (Cal), *Madan Mohun Dey v. Ganga Chandra Roy*.
(1918) A I R 1918 Oudh 84 (85) · 20 Oudh Cas 332 : 43 Ind Cas 342, *Manna Lal v. Sardar Singh*.
(1924) A I R 1924 Mad 906 (907) : 82 Ind Cas 497, *Arunachalam Chettiar v. Lalshmanan Chettiar*.
(1897) 22 Bom 722 (726), *Trimbal v. Kashinath*. (Mere payment of *batta* under circumstances from which no application can be inferred is not step-in aid.)
(1900) 10 Mad L Jour 329 (Jour).
- 3 (1905) 28 Mad 399 (399, 400), *Vijayaagharatu Naidu v. Srinivasulu Naidu*.
(1910) 7 Ind Cas 859 (860) (Mad), *Subramania Pillai v. Sanlara Subbu Naidu*.

(1922) A I R 1922 Mad 80 (80) · 70 Ind Cas 80, *Krishna Aiyar v. Mayan Kutti*. (An application to the Court to receive railway charges for taking the judgment-debtor to the civil prison and subsistence money for his maintenance while in prison is a step-in-aid of execution.)

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(Clause 5)
Notes 118-119**

in an execution proceeding is only an application for a step of an incidental nature and would not constitute an application for a step-in-aid of execution.^{3a}

To render the batta memo an application which would give a fresh starting point of limitation, it is however essential that the application in which it is filed should itself be one in accordance with law.⁴

118a. Payment of allowance for the subsistence of the judgment-debtor. — An application to the Court to receive the subsistence allowance and the railway fare for sending the judgment-debtor to the civil jail is one to take a step-in-aid of execution.¹ In *Ramudu v. Varadaraja*,² it was held that the mere payment of subsistence allowance cannot operate as a step-in-aid of execution. *Kuppuswamy*³

of the subsistence allowance by money-order to the jail authorities was an application to the proper Court to take some step-in-aid of execution.

119. Application by decree-holder for copies. — A copy of decree can be applied for a variety of purposes and not necessarily for execution. Therefore, an application by the decree-holder for a copy of decree cannot be necessarily one to take a step-in-aid of execution.¹ An application by the decree-holder for the return of the

(1922) 1922 Bom 1131, *Blama v. Ramudu*.

Varadaraja Mudaliar v. ...
the sale warrant is a

Nath Dutt. (When payment of process fees and the filing of notice of sale imported a request to the Court to proceed in the matter and was equivalent to an application to take some step-in-aid.)
[See (1883) 7 Mad 307 (309), *Vellaya v. Jaganatha*. (II, when postage was paid for the transmission of the records to a Court)]

... his decree transferred for ... to take some step-in-aid of ... to give a new period of limitation.)]

3a. (1926) A I R 1926 Nag 250 (251) : 91 Ind Cas 1019, *Shrinivas v. Jagannath*.

4. (1934) A I R 1934 M ...
Bheema Rao.
holder and per ...
dance with law within the meaning of Article 182, ...
filed in such an application can hardly furnish a starting point of limitation)

Note 118a

1. (1922) A I R 1922 Mad 30 (30, 31) : 70 Ind Cas 60, *Krishna Aiyar v. Vettal Mayankutts*.
2. (1921) A I R 1921 Mad 532 (532) : 62 Ind Cas 460.
3. (1933) A I R 1933 Mad 83 (84, 85) : 140 Ind Cas 493 : 56 Mad 320.

Note 119

1. (1933) A I R 1933 All 756 (756) : 145 Ind Cas 915, *Narayan Das v. M. Taravati*.
- (1920) A I R 1920 Mad 221 (221) : 60 Ind Cas 117, *Puthia Vettal Mohidin v. Raman Nayar*.

copy of the decree filed in previous execution proceedings (even for the purpose of filing subsequent execution application) does not imply any step-in-aid of execution of the decree.² An application by the decree-holder for a copy of the list of properties attached in previous execution proceedings is not one to take a step-in-aid of execution.³

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120. Application for execution of attached decree.—*A* obtains a decree *X* against *B*, and in execution thereof attaches a decree *Y* which *B* has obtained against *C*. Under the provisions of Order 21 Rule 53 of the Code of Civil Procedure, *A* would be entitled to execute decree *Y*. *B* also would, notwithstanding the attachment, be entitled to execute the same decree.^{1a} *A*'s application to execute the decree *Y* would be one to take a step-in-aid of execution of decree *X*.¹ If *B* applies to execute his decree *Y*, his application will keep alive his decree under the first portion of clause 5.² *A*'s application to attach decree *Y* will however not be a step-in-aid of the execution of the attached decree *Y*.³

121. Application for transfer or re-transfer of decree, if a step-in-aid.—An application to have a decree transferred to another Court for execution, though not an application for execution (see Note 10 *ante*), will be an application to take a step-in-aid of execution within the meaning of clause 5.¹ An application, however, for transfer of a decree to a Court which has no jurisdiction to execute it is not

(1886) 12 Cal 441 (444), *Rajkumar Banerji v. Rajlakh Dabi*.

(1888) 11 Mad 336 (339), *Gopilandhu v. Domburu*. (Step means necessary steps.)

2. (1896) 6 Mad L Jour 23 (24), *Mahalinga Chettiar v. Narayana Padayachi*.

(1893) 23 Bom 311 (312), *Rajaram v. Banaji Mairal*.

(1885) 11 Cal 227 (229), *Gunga Pershad Bhoomick v. Debi Sundar Dabee*.

(1895) 22 Cal 827 (829), *Aghore Kali Debi v. Prosunna Coomar Banerjee*.

3. (1898) 21 Mad 400 (401) 8 Mad L Jour 53, *Rangachariar v. Balaramasami Chetti*.

Note 120

1a(1897) 24 Cal 778 (783) . 1 Cal W N 676, *Adhar Chandra Das v. Lal Mohun Das*.

1. (1931) A I R 1931 Lah 705 (706) : 132 Ind Cas 667, *Bishan Sahai v. Amir Singh*.

(1914) A I R 1914 All 296 (299) . 25 Ind Cas 738, *Maharaja of Jaipur v. Lalji Sahai*.

(1910) 8 Ind Cas 675 (676) (Cal), *Gaya Loan Office Co. Ltd. v. Dhirst Kundal Lal*.

(1885) 7 All 382 (383, 384) . 1885 All W N 64 : 9 Ind Jur 363, *Lachman v. Thonda Ram*.

2. (1903) 18 Mad L Jour 265 (265, 266), *Patamma v. Idni Bears*.

3. (1934) A I R 1934 Cal 234 (235) : 149 Ind Cas 999 : 60 Cal 1357, *Anil Kumar Ghosh v. Hemanta Kumar Ghose*.

Note 121

939) All 97 : 180 Ind Cas 403, *Sita*

nd Cas 225, *Sheskh Hafceezuddin v.*

(1936) A I R 1936 All 369 (369, 370) : 163 Ind Cas 231, *Mansa Ram v. Badri Prasad*.

(1926) A I R 1926 All 600 (600) : 95 Ind Cas 26, *Saklu Chaudhari v. Harbansdeo Rai*.

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(Clause 6)
Note 121**

one in accordance with law even as a step-in-aid of execution.² As to whether an application for the transfer of a decree, against the judgment-debtor who is dead, is one in accordance with law as a step-in-aid of execution, see Note 85 *ante*. See also the undermentioned cases.^{2a}

(1916) A I R 1916 All 293 (291) : 33 Ind Cas 523, *Mt. Larets v. Hasan Lal*.
(1916) A I R 1916 All 24 (25) : 32 Ind Cas 1005, *Sant Lal v. Sri Newas Das*
(1913) 19 Ind Cas 664 (665) : 35 All 389, *Todarmal v. Phoola Kuar*.

(1879) 2 All 284 (284), *Collins v. Maula Bakhsh*.

(1877) 1 All 525 (526), *Hussain Dulksh v. A. D. Madge*.

(1937) A I R 1937 Bom 365 (368) : 170 Ind Cas 877 : I L R (1937) Bom 691,
In re Janaki Prasad Poddar.

(1935) A I R 1935 Cal 640 (640) : 158 Ind Cas 590, *Ahad Bux Jamadar v. Kinkar Chandra Pal*.

(1931) A I R 1931 Cal 812 (818) : 58 Cal 832 : 132 Ind Cas 149, *Sreenath Chakravarti v. Priyanath Bandopadhyaya*.

(1904) 8 Cal W N 575 (577), *Bhabani Churn Dutt v. Partap Chandra Ghosh*.

(1897) 2 Cal W N 415 (416), *Roma Nath Sen v. Gouri Sanhar Khatri*.
unno Ghose.

nan Pundeh

(1931) A I R 1931 Lah 786 (788) : 13 Lah 327 : 134 Ind Cas 1026, *Bombay Company Ltd. Karachi v. Kahan Singh*.

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678, *Shanta Dutt Ram v.*

Lal Basant Singh v. Lal

Has Husam v. Shahzaman

(1936) A I R 1936 Pat 313 (314) : 162 Ind Cas 984, *Bhagwat Sahay v. Ram Sukrit Ram*.

(1922) A I R 1922 Pat 301 (302) : 1 Pat 328 : 65 Ind Cas 332, *Ramchandra Marwari v. Krishna Lal Marwari*.

(1937) A I R 1937 Rang 477 (480) : 1937 R L R 287 : 173 Ind Cas 160,
Ramchandra Marwari v. Krishna Lal Marwari

27 Sind L R 109, *Achraj*

Ind Cas 399, *Bhagwat*

(1935) A I R 1935 Cal 640 (640) : 158 Ind Cas 590, *Ahad Bux v. Kinkar Chandra*.

[But see (1931) A I R 1931 Pat 662 (663) : 152 Ind Cas 987, *Gopal Tewari v. Ramdhari Pandey*.]

2 (1939) A I R 1939 All 57 (59) : 180 Ind Cas 403 : I L R (1939) All 97, *Sita Ram Rai v. Madho Prasad*.

(1932) A I R 1932 Pat 309, (311) : 11 Pat 785 : 142 Ind Cas 155, *Sital*

: A I R

See also Note 84 *ante*.

Cas 403 : I L R (1939) All 97, *Sita*

Pat 651 : 67 Ind Cas 538, *Amrit Lal*

As to whether an application for the transfer of a decree to a foreign Court is a step-in-aid of execution, see Note 107 *ante*.

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(Clause 5)
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An application to the transferee Court to send a certificate of the result of the execution and to return the decree to the Court which passed the decree for further execution, is a step-in-aid of execution.³

Where a decree is transferred to another Court for execution, an application to the Court which passed the decree to recall it for execution to the parent Court itself, is a step-in-aid.⁴

122. Application by decree-holder for leave to bid, if step-in-aid.—There is a diversity of opinion among the High Courts on the question whether an application by the decree-holder for leave to bid at the execution sale is one to take a step-in-aid of execution. The Allahabad¹ and Bombay² High Courts and the Chief Court of Oudh³ hold that it is. In *Dalel Singh v. Umrao Singh*,⁴ their Lordships of the Allahabad High Court observed as follows :

"The fact that a decree-holder is prepared to bid for property and is anxious to purchase is, in the absence of a fraud which cannot be presumed, distinctly an act which modifies the conditions of the sale to the obvious benefit both of the decree-holder and the judgment-debtor, and brings the decree within nearer distance of complete execution and satisfaction."

The High Court of Calcutta has expressed conflicting views on the point. According to the cases cited below,⁵ an application of this

- 3. (1883) 6 Mad 81 (82), *Krishnayyar v. Venkayyar*.

(1898) 2 Cal W N 271 (271) (Notes), *Chandranath v. Bhudhar*.

[See however (1906) 3 Cal L Jour 94 (94) (S N), *Sayaram Chatterji v. Haridas Chatterji*. (An application made to the Court which originally passed the decree, for an order that execution costs might be received and for recalling the decree from the Court to which it was sent for execution, is not to be considered as a step-in-aid of execution)]

4. (1939) A I R 1939 Pat 144 (146) : 17 Pat 617 (621) : 180 Ind Cas 311, *Dwarkanadas Gobindram v. Saligram Rekhraj*.

(1928) A I R 1928 Mad 493 (494) : 110 Ind Cas 829, *Mahadum Beg Sahab v. Md. Meera Sahab*.

(1935) A I R 1935 Lah 465 (474) : 157 Ind Cas 488 (F B), *Kanti Narain v. Madan Gopal*. (Decree transferred to another Court for execution—Application to Court which passed decree to transfer it for execution to same Court before proceedings in that Court have been reported and certified by that Court is a valid application and is step-in-aid.)

[But see (1922) A I R 1922 Bom 359 (360) : 68 Ind Cas 506 : 47 Bom 56, *Rangaswami Shetty v. Sheshappa*. (Decree transferred to another Court—Application for further transfer made to transferor Court is not step-in-aid as it ceases to be proper Court.)]

Note 122

1. (1900) 22 All 399 (400) : 1900 All W N 129, *Dalel Singh v. Umrao Singh*.
(1891) 18 All 211 (213) : 1890 All W N 230, *Bansi v. Sirkree Mal*.

2. (1895) 21 Bom 331 (333), *Vinayakrao Gopal v. Vinayak Krishna*.

3. (1905) 8 Oudh Cas 161 (166), *Nawab Safia Begam v. Nawab Raisunnissa*.

4. (1900) 22 All 899 (400) : 1900 All W N 129.

5. (1896) 23 Cal 690 (692), *Raghunundun Misser v. Kallydutt Misser*.

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Note 122

kind is not an application seeking the aid of the Court in execution of a decree, and though it may be in one sense a step-in-aid of execution of the decree, it is not a step by the Court, and before a judgment-creditor can get any benefit, he must show that he asks the Court to take some step-in-aid of execution. A somewhat different view has been taken in other cases. In *Troylokya Nath v. Jyoti Prakash*,⁶ Bannerjee, J., observed as follows :

"An application to the Court by the decree-holder to give him leave to bid is to my mind an application to the Court to take some step, that is, to do something which would aid execution, that is, make it effective by securing a higher price for the property to be sold."

In *Hira Lal Bose v. Dwija Charan Bose*,⁷ Rampini, J., held that such an application would not be a step-in-aid of execution, but Mookerjee, J., observed as follows :

"I do not think it can be rightly affirmed as an inflexible rule of law that the granting of leave to a decree-holder to bid at the sale must in every case, or may not in any case, amount to an aiding of the execution. In determining whether a particular step which the Court is invited to take is or is not a step-in-aid of execution, regard must be had not merely to the nature of the step to be taken, but also to the surrounding circumstances."

The said view of Mr. Justice Mookerjee has been adopted by a Full Bench of the High Court of Lahore.^{7a}

There is no reported decision of the Madras High Court directly on the point, but in *Vappu Rowther v. Sivakataksham Pillai*,⁸ the observations of Mr. Justice Venkatasubba Rao, though *obiter*, tend to support the view that an application for leave to bid is a step-in-aid of execution.

An application for leave to bid at the auction sale coupled with a request to set off the purchase money against the decretal amount has been held to be one to take a step-in-aid of execution on the ground that the request to the Court to set off the purchase money against the decretal amount is one in furtherance of the execution.⁹

(1917) A I R 1917 Cal 422 (424) : 37 Ind Cas 788, *Jogendra Prosad Mitra v. Isulosh Goswami*.

6. (1903) 30 Cal 761 (769, 770, 771) : 8 Cal W N 251.

7. (1905) 3 Cal L Jour 240 (246, 248) : 10 Cal W N 209.

7a (1931) A I R 1931 Lah 81 (83) : 191 Ind Cas 100 : 12 Lah 153 (F B). *Ghanaya Lal v. Nathu Ram*. (1884 Pan. Re. No. 68 and 14 Ind Cas 468, Referred to.)

[See however (1929) A I R 1929 Lah 57 (58) : 113 Ind Cas 909. *Ghanayya Lal & Co. v. Jassa Ram Hira Nand*. (Quare—Whether an application by a decree-holder for leave to bid is an application to take a step-in-aid of execution.)]

8. (1930) A I R 1930 Mad 588 (589) : 53 Mad 390 : 123 Ind Cas 577.

9 (1930) A I R 1930 Mad 588 (589) : 53 Mad 390 : 123 Ind Cas 577, *Vappu Rowther v. Sivakataksham Pillai*.

(1929) 57 Mad L Jour 2 (2) (N R C).

(1908) 12 Cal W N 621 (622), *Nabadip Chandra Maili v. Depin Chandra Pal*.

123. Application for delivery of possession by decree-holder auction-purchaser. — The decisions of the High Courts are not uniform on the question whether, where the decree-holder himself purchases the property in execution and applies for delivery of possession of the property to him, the application is a step-in-aid of execution. According to the High Courts of Madras,¹ Bombay,² Calcutta³ and the Punjab Chief Court,^{3a} such an application is one to take a step-in-aid of execution. They proceed on the view that until possession is secured to the decree-holder, the execution is not complete and the decree cannot be said to be satisfied. The Judicial Commissioner's Court of Nagpur⁴ is also inclined to the same view. On the other hand, the High Courts of Patna⁵ and Allahabad⁶ have held that such an application is not one to take a step-in-aid of execution. The reasoning on which this view is based is that execution comes to an end with the sale of the property and that the question whether or not the auction-purchaser obtains possession of the property sold is wholly immaterial for the purpose of the decree and does not in any way affect it.

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(1905) 8 Oudh Cas 161 (166), *Nawab Safia Begam v. Nawab Raisunnissa*.
(But see (1895) 23 Cal 196 (199), *Ananda Mohan Roy v. Hara Sundaree*.)

Note 123

1. (1929) 122 Ind Cas 526 (526) : 57 Mad L Jour 468 (469), *Appathuras Iyer v. Panayappan*.
- (1927) A I R 1927 Mad 298 (290, 291) : 99 Ind Cas 677 : 50 Mad 403, *Mathankandi Kannan v. Attulla Haji*.
- (1933) A I R 1933 Mad 745 (746) : 145 Ind Cas 397, *Apparao Nainar v. Lakshmana Reddi*.
- (1901) 24 Mad 185 (188), *Lakshman Chettiar v. Kannammal*.
- 2 (1911) 11 Ind Cas 987 (989) : 35 Bom 452, *Sadashiv Mahadu v. Narayan Vithal*.
- 3 (1900) 27 Cal 709 (712, 713) 4 Cal W N 681, *Sariatoola Molla v. Raj Kumar Roy*.
- (1909) 1 Ind Cas 430 (431) (Cal), *Pran Krishna Dhar v. Juramon Chowkidar*.
- (1909) 9 Cal L Jour 67 (67) (S N).
- (1920) A I R 1920 Cal 230 (231) . 54 Ind Cas 839, *Annada Prasanna Sen v. Someruddi Mardha*. (Per Newbould, J.)

3a (1904) 1904 Pun Re No. 18, *Mt. Lal Deb v. Karim Bakhsh*.

4. See (1933) A I R 1933 Nag 869 (870) : 147 Ind Cas 582, *Nathu Harishanker v. S. Fatusa*.
5. (1922) A I R 1922 Pat 310 (311) : 1 Pat 701 : 68 Ind Cas 638, *Kamal Nam Singh v. Maharaja Bahadur Kesho Prasad Singh*.
- (1923) A I R 1923 Pat 22 (25) . 2 Pat 249 : 72 Ind Cas 938, *Triloke Nath Jha v. Bansman Jha*.
[See (1932) A I R 1932 Pat 266 (267) . 11 Pat 513 : 139 Ind Cas 843, *Seshayyer Rajamanner v. Madanmohan Painaik*.]
6. (1928) A I R 1928 All 368 (370) : 50 All 670 : 115 Ind Cas 869, *Mohsin Raza Khan v. Haider Bakhsh*.
- (1909) 1 Ind Cas 416 (419, 420) : 31 All 62 (F B), *Bhagwati v. Banwari Lal*.
[But see (1897) 19 All 477 (478) : 1897 All W N 117, *Moti Lal v. Makund Singh*. (Overruled by 1 Ind Cas 416 (F B).)]

124. **Certification under Order 21 Rule 2 of the Civil Procedure Code.**—Before the decision of the Privy Council in *Raja Sri Prakash Singh v. The Allahabad Bank*,¹ there was a difference of opinion on the question whether a certification under Order 21 Rule 2, Civil Procedure Code, by the decree-holder, of a payment made to him out of Court was firstly an "application" and secondly a step-in-aid of execution. It was held in some cases that the act of certification was itself an application to take a step-in-aid of execution within the meaning of this Article.² It was held in other cases that an application made by the decree-holder to record a certification was an application to take a step-in-aid of execution.³ In the undermentioned case⁴ an oral application was presumed to have been made from the act of certification and it was held that it was one to take a step-in-aid of execution. In the cases cited below,⁵

(1919) A I R 1919 All 890 (890) : 41 All 479 : 50 Ind Cas 143, *Babu Ram v. Pearey Lal*.]

1. (1929) A I R 1929 P C 19 (23) : 114 Ind Cas 581 : 3 Luck 684 : 56 Ind App 30 (P O).

2. (1911) 9th Ind Cas 1023 (1024) : 83 All 529, *Lecky v. Bank of Upper India, Ltd.*

(1906) 1906 Pun L R No. 34, *Barkat Ali v. Ganga Ram*.

3. (1925) A I R 1925 Mad 131 (132) : 82 Ind Cas 743, *Narayan Nair v. Kunkhi Raman Nair*.

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(1903) 26 All 19 (20) : 1903 All W N 172, *Kasumri v. Beni Prasad*.

(1924) A I R 1924 Nag 185 (186) : 78 Ind Cas 291, *Mt. Perabai v. Bharani Prasad*.

(1922) A I R 1922 Nag 166 (167) : 18 Nag L R 62 : 65 Ind Cas 681, *Lachman v. Gahreshwar*.

(1925) A I R 1925 Rang 26 (27) : 2 Rang 393 : 84 Ind Cas 369 and 473,
Maung Law Sen v. Maung Po Thin.

(1886) 12 Cal 608 (609), *Tarini Das Bandopadhyaya v. Bishoo Lal Mukhopadhyaya*.

(1919) 30 Cal L Jour 15 (S N).

(1916) A I R 1916 Cal 356 (257) : 94 Ind Cas 625, *Gopal Prosad v. Rajendra Lal*.

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[But see (1888) 1888 All W N 23 (24), *Kankia Lal v. Rudar Sahai*.
(An untrue certificate by a decree-holder under Section 258 of
the Code of Civil Procedure is not a step-in-aid of execution.)]

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the view was taken that the act of certification was not an application at all. The decision of their Lordships of the Privy Council in *Sri Prakash Singh's case* referred to above must now be taken to have set the conflict at rest. The question in that case was whether the mere certification by the decree-holder should be considered to be an application so as to be governed by the provisions of Article 181. After a review of the provisions of Order 21 Rules 1 and 2 of the Code of Civil Procedure, their Lordships have held that a mere certification by the decree-holder of a payment made to him out of Court is not an "application" within the meaning of Article 181 and further, the fact that an application is actually filed for the recording of such certification did not really alter the nature of the procedure and convert what was really no more than a certificate into an "application" within the meaning of Article 181.

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Their Lordships, however, did not in the case referred to above think it necessary to express any opinion as to whether a certification would amount to "an application to take a step in aid of execution of the decree" within the meaning of clause 5 of this Article. But it has been held in cases decided after the date of the said Privy Council decision that the same reasoning would apply in interpreting the word "application" occurring in this Article and that, therefore, a certification would not be an application at all.⁶ It has further been held that the act of certification is not a step-in-aid of execution as, firstly it is not a step to be taken by the Court, and secondly that such step does not in any view *further* the execution of the decree.⁷

But though a certification may not operate so as to give a fresh starting point under clause 5 of this Article, it may enable a fresh

- (1929) A I R 1929 All 629 (635) 51 All 237 112 Ind Cas 73 (F B) *Joti Prasad v. Srivchand*.
6. (1930) A I R 1930 All 461 (461) 127 Ind Cas 424, *Bansgopal v. Mewa Ram*.
(1933) A I R 1933 All 364 (365, 366) 55 All 393 146 Ind Cas 836, *Adya Prasad Singh v. Lal Givish Bahadur Pal*.
- (1931) A I R 1931 Cal 719 (724) 59 Cal 760 184 Ind Cas 922 (F B), *Amar Krishna Chaudhury v. Jagat Bandhu Biswas*.
- (1930) A I R 1930 Rang 64 (65) 126 Ind Cas 540, *Maung Tun Hlaing v. U Aung Gyaw*.
- (1936) A I R 1936 Pat 386 (388) 163 Ind Cas 915, *Maheshwar Charan v. Dineshwari Charan*.
- (1934) A I R 1934 Oudh 426 (427) 9 Luck 298 147 Ind Cas 766, *Surasya Begam v. Triloki Nath*. (There cannot be any "final order" in such cases.)
- (1932) A I R 1932 Oudh 148 (151) 137 Ind Cas 768 7 Luck 590 (FB), *Ram Bharose v. Ramman Lal*.
7. (1931) A I R 1931 Cal 719 (725) 134 Ind Cas 922 59 Cal 760 (F B), *Amar Krishna Choudhury v. Jagat Bandhu Biswas*.
(1933) A I R 1933 All 364 (365, 366) 55 All 393 146 Ind Cas 836, *Adya Prasad Singh v. Lal Givish Bahadur Pal*.
- (1935) A I R 1935 All 259 (261) 157 Ind Cas 1052, *Hari Ram v. Human Lal*.
- (1936) A I R 1936 Mad 118 (119) 159 Ind Cas 544 59 Mad 424, *Union Board, Pentapadu v. Venkata Srinivasa Charyalu*.
[But see (1933) A I R 1933 All 49 (50) 143 Ind Cas 924, *Jai Karan v. Panchaiti Akhara Chota Naya Udasi Nanaal Shahi*. (Assumed for purposes of argument.)]

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(Clause 5)
Notes 124-125

period of limitation to be computed under the provisions of Section 20 *ante*. See Note 30 to Section 20 and the undermentioned cases.⁸

125. Application for payment out of monies lying in Court.—Where money is paid into Court in satisfaction of a decree or where money is lying in Court as a result of the realizations in execution of a decree and the decree-holder applies for the payment out to him of such monies in *pro tanto* satisfaction of the decree, the question arises whether the application for such payment out is one to take a step-in-aid of execution. The general trend of opinion of all the Courts except the High Courts of Calcutta and Lahore is that such an application is one to take a step-in-aid of execution within the meaning of this Article.¹ The reason for this view has been explained in some cases as being that the execution of a decree is not complete

- S. (1927) A I R 1927 All 827 (828) : 100 Ind Cas 574, *Jawala Sahai v. Bhim Singh*.
 (1912) 15 Ind Cas 523 (524) : 15 Oudh Cas 234, *Ram Sarup v. Jagannath Prasad*.
 (1917) A I R 1917 Cal 422 (425) : 37 Ind Cas 788, *Jogendra Prasad Mitra v. Ashutosh Goswami*.
 (1936) A I R 1936 Oudh 297 (297, 298) : 162 Ind Cas 717, *Maya Prakash v. Tulsi Ram*.
 (1922) A I R 1922 Mad 66 (66) : 65 Ind Cas 830, *Arunachalam Chettiar v. Panchali Padayachi*.
 (1935) 89 Cal W N 961 (966), *Shamsul Huq v. Abdul Rahman*.
 (1919) A I R 1919 All 211 (212) : 52 Ind Cas 862, *Qadam Singh v. Nathu Singh*.
 (1936) A I R 1936 Nag 281 (282) : 165 Ind Cas 804 : ILR (1937) Nag 106, *Bajynath v. Kanhaiyalal*.
 (1915) A I R 1915 Sind 48 (49) : 30 Ind Cas 51 : 9 Sind L R 27, *Narasimhai v. Tirathmal*.
 (1933) A I R 1933 Sind 365 (366) : 147 Ind Cas 30, *Kalandas Balchand v. Mahomed Khan*.

Note 125

1. (1938) A I R 1938 All 210 (212) : I L R (1938) All 342 : 175 Ind Cas 185, *Latafat Ali Khan v. Kalyan Mal*.
 (1901) 1901 All W N 29 (29), *Kali Charan v. Hardeo Das*.
 (1888) 6 All 866 (867) 1884 All W N 118, *Param Singh v. Jawahir Singh*.
 (1882) 1882 All W N 154 (154), *Kishori Lal v. Sham Karan*.
 (1901) 24 Mad 188 (193, 194) : 10 Mad L Jour 342, *Venkataramanamma v. Purushottam*.
 (1919) A I R 1919 Mad 929 (930) : 48 Ind Cas 226, *Thangi Shettathi v. Duya Shetti*.
 (1898) 17 Mad 165 (166) : 3 Mad L Jour 295, *Koormayya v. Krishnamma*.
 (1900) 23 B L J 163 (163), *...*
 .. same Nucleon
 (1896) 22 Bom 340 (343), *Bapuchand v. Mugutan*.
 (1894) 19 Bom 261 (267) : 1894 Bom P J 64, *Keshavlal v. Patamberdas*.
 (1925) A I R 1925 Bom 443 (443, 444) : 89 Ind Cas 228, *Mulchand v. Jamanbhai*. (Application need not be in writing)
 (1916) A I R 1916 Oudh 153 (154) : 18 Oudh Cas 359 : 23 Ind Cas 557, *Dharam Raj Kuar v. Lachhman Bhuji*.
 (1877) 11 C P L R 161 (163), *Lachhman Jai v. Hira Derr*.
 [But see (1883) 5 All 289 (292, 293) : 1883 All W N 33, *Radha Prasad Singh v. Bhagwan Das*.
 (1911) 12 Ind Cas 734 (734) (All), *Behari Lal v. Raghunandan*.]

until the decree-holder actually withdraws the amount from Court in satisfaction of his decree.² In the undermentioned cases³ the reason for this view was stated to be that, in order to make the amount available to the decree-holder, an order of the Court was necessary after a consideration of various questions such as the sufficiency of the amount of decretal money deposited by the judgment-debtor, whether the deposit was made on any condition, whether there are any petitions for rateable distribution, etc.

The High Courts of Calcutta⁴ and Lahore⁵ have, on the other hand, held that, as a general rule, such an application is not one to take a step-in-aid of execution, where the judgment-debtor does not contest the withdrawal of the amount. The ground of this view is that as soon as the amount is realized in execution or received by the Court in satisfaction of the decree, the decree is to that extent satisfied and the execution complete,⁶ that the order for the payment of the amount is merely a *ministerial* act,⁷ and further that a person who takes steps to acquire the fruits of the execution of the decree

2. (1938) A I R 1938 All 210 (212). I L R (1938) All 842. 175 Ind Cas 186, *Latafat Ali Khan v. Kalyan Mal*.
(1916) A I R 1916 Oudh 153 (153): 18 Oudh Cas 359: 33 Ind Cas 557, *Dharam Raj Kuar v. Lachhman Bhuj*.
(1896) 22 Bom 340 (343), *Bapuchand Jotram Gujar v. Mugul Rao*.
3. (1916) A I R 1916 Oudh 153 (153): 18 Oudh Cas 359: 33 Ind Cas 557, *Dharamraj Kuar v. Lachman Bhuj*.
(1919) A I R 1919 Mad 929 (930): 48 Ind Cas 226, *Thangi Shettithi v. Duja Shetti*.
4. (1834) 10 Cal 549 (550, 551), *Fazal Imam v. Mettia Singh*.
(1885) 11 Cal 227 (229), *Gunga Pershad Bhoomick v. Debi Sundari Dabta*.
(1891) 8 Cal 89 (91). 10 Cal L R 272, *Hem Chunder Chowdhry v. Brojo Soondury Dabee*.
(1875) 24 Suth W R 339 (340), *Woodo Tara Chowdhram v. Abdul Jubbur Chowdhry*.
(1866) 6 Suth W R Misc 49 (49), *Kushen Mohun Jush v. Chunder Kant Chuckerbutty*.
(1906) 10 Cal W N 354 (358) (F B), *Apurba Krishna Roy v. Chundermoney Debi*.
[But see (1867) 8 Suth W R 274 (275), *Jogesh Prokash Gangooly v. Kales Koomar Roy*.]
5. (1912) 14 Ind Cas 335 (337) (Lah), *Ram Das v. Kanshe Ram*.
(1903) 1908 Pun Re No. 103. 1908 Pun L R No. 207. 1903 Pun W R No. 142 (F B), *Kasu v. Atar Singh*.
(1938) A I R 1938 Lah 138 (139). 175 Ind Cas 260, *Amolakchand v. Hoshkar Singh*.
(1938) A I R 1938 Lah 678 (679). I L R (1938) Lah 586. 178 Ind Cas 995, *Hira Lal v. Mohna Singh*.
(1881) 1881 Pun Re No. 107, *Nawab Saadat Ali Khan v. Nawab Muhammad Ali Khan*.
(1888) 1888 Pun Re No. 27, *Mulchand v. Kour Singh*.
6. (1908) 1908 Pun Re No. 103. 1908 Pun L R No. 207. 1903 Pun W R No. 142 (F B), *Kasu v. Atar Singh*.
(1881) 1881 Pun Re No. 107, *Nawab Saadat Ali Khan v. Nawab Muhammad Ali Khan*.
7. (1908) 1908 Pun Re No. 103. 1908 Pun L R No. 207. 1903 Pun W R No. 142 (F B), *Kasu v. Atar Singh*.
(1938) A I R 1938 Lah 138 (139). 175 Ind Cas 260, *Amolakchand v. Hoshkar Singh*.

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cannot possibly be said to take a step-in-aid of the execution of the decree.^{7a} It was held in the undermentioned case⁸ that where the payment out to the decree-holder is contested by the judgment-debtor, then a judicial order would be necessary for paying the amount to the decree-holder and that, in such a case, the application by the decree-holder would be one to take a step-in-aid of execution.

In the cases cited below,⁹ the guardian of the judgment-debtor under a mortgage decree obtained the sanction of the Court to raise money by mortgaging the mortgaged property, and mortgaged the property to a third person who paid into Court a certain amount towards the decree. The decree-holder applied for payment out of this amount. It was held that the money was paid into Court *to the credit of the suit* and was not realised *in execution of the decree* and that the application for the payment of such money was not one in aid of the execution of the decree.

It is submitted that the true test seems to be to see whether in the particular case the decree-holder could, at the time of his application, *have executed his decree for such amount*. If he could not, then the application cannot be a step-in-aid of execution. If, on the other hand, he could execute the decree, then the application for payment out would be a step-in-aid of execution of the decree. In *Khajah Mahomed Hossein Khan v. Syud Looft Ali Khan*,¹⁰ a case under the Act of 1859, certain monies were deposited in satisfaction of the decree but, for a considerable time, the Court declined to pay the money out to the decree-holder. It was held that under such circumstances the decree-holder could have executed the decree for this amount and that the application for payment out was a proceeding to enforce the decree.

In view of the above discussion, it is submitted that the views of the Calcutta and Lahore High Courts appear to be sound on principle.

An application by the holder of a decree, A, for the rateable distribution of monies received in execution of another decree against the same judgment-debtor and for payment out of the amount distributable to him is a step-in-aid of execution of the decree of A.¹¹

126. Application for substitution of representatives. — The Code of Civil Procedure does not specifically provide for or contemplate an application being made merely to bring on record the legal

7a. (1908) 1908 Pun Re No. 103 : 1908 Pun L R No. 207 : 1908 Pun W R No. 142 (F B), *Kasu v. Atar Singh*. (12 All 899, Dissented from.)

[See also (1938) A I R 1938 Lah 133 (139) : 175 Ind Cas 260, *Amolachand v. Hoshnar Singh*]

8. (1908) 1908 Pun Re No. 103 : 1908 Pun L R No. 207 : 1908 Pun W R No. 142 (F B), *Kasu v. Atar Singh*.

9. (1925) A I R 1925 Mad 703 (704) : 87 Ind Cas 989, *Balaguruswami Naicken v. Guruswami Naicken*.

[See also (1899) 22 Mad. 448 (452), *Appasami Naicken v. Jotha Naicken*.]

10. (1872) 18 Suth W R 463 (463).

11. (1903-04) 8 Cal W N 382 (385), *Basj Nath Prosad v. Ghanshyam Dass*.

representatives of the decree-holder or the judgment-debtor, as the case may be.

But such an application, if made, would be one in accordance with law inasmuch as it does not contravene the law, and would be one to take a step-in-aid of execution of the decree.¹

Where an application for execution contains also a prayer for the substitution of the legal representatives of the deceased judgment-debtor, and the application is not one in accordance with law in so far as it is one for execution, it may nevertheless operate to save time as an application to take a step-in-aid of execution, having regard to the prayer for substitution.² See also Note 109, *ante*.

127. Application for substitution of name of transferee of decree, if step-in-aid. — See Note 78, *ante*.

128. Other illustrative instances of step-in-aid. — The following applications have been held to be to take steps-in-aid of execution —

1. Application for the substituted service of notice of execution.¹

Note 126

1. *Independent application to substitute legal representative of judgment-debtor:*

- (1927) A I R 1927 Nag 308 (309, 310) : 24 Nag L R 86 : 103 Ind Cas 279, *Ramchandra v. Uka*
 (1907) 30 Mad 541 (543) : 17 Mad L Jour 485 : 8 Mad L Tim 21, *Mahalinga Moopanan v. Kuppanchariar*.
 (1925) A I R 1925 Oudh 77 (78) : 79 Ind Cas 880, *Rudra Pratab Singh v. Sheo Prasad*.

Application for substitution of legal representative of judgment debtor pending execution application

- (1927) A I R 1927 All 698 (698, 699) : 103 Ind Cas 244, *Manmohan Das v. Rashiduddin*.

Application for substitution of legal representatives of decree-holder

- (1906) 17 Mad L Jour 475 (475), *Shrinivasa Iyengar v. Dharmu Mudaly*.
 (26 All 301, Followed.)
 (1894) 1894 Pun Re No. 27, *Kundanlal v. Mt. Makhani*
 (1906) 9 Oudh Cas 281 (282), *Makrand v. Ramcharan*.
 (1926) A I R 1926 Cal 267 (270) . 85 Ind Cas 657, *Birendra Chandra Singh Bahadur v. Tulsi Charan Ghose*.
 (1928) A I R 1928 All 223 (200) . 103 Ind Cas 412 . 50 All 621, *Mohan Singh v. Jagat Singh*.

Dewan Chand.

berdas Tribuvandas.

2. (1932) A I R 1932 Mad 19 (20) . 134 Ind Cas 59 . 54 Mad 852, *Chinna Vel Naick v. Venkatarama Naick*.

(1908) A I R 1908 Cal 84 (1908) 30 Cal 1055, *Dibi v. Bulaga*

ish v. Kumara
 ing for the legal
 on the record is

sufficient to give a fresh starting point for limitation even if it contains errors in the matter of relief)

Note 128

1. (1914) A I R 1914 All 392 (393) : 36 All 439 : 24 Ind Cas 200, *Amina Bibi v. Danarasi Prasad*.

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Note 128

2. Application for summoning a necessary witness in execution proceedings,² or an application for the attachment of the judgment-debtor's property in execution,³ or an application for issue of any other process.⁴
3. Application to allow the sale of the property of the judgment-debtor subject to the mortgage of the third party-claimant.⁵
4. Application in a pending application for execution to supply certain defects in the latter in respect of the mode of execution.⁶
5. Application to stay the sale in execution but to continue the attachment.⁷
6. Memo praying the Court to hold a sale in connexion with a pending execution.⁸
7. Application for continuation of an execution sale in order to secure the proper attendance of bidders.⁹
8. Application for the correction of a decree by the addition of interest omitted to be mentioned in the decree.¹⁰
9. Application by holder of decree for redemption to send notice to judgment-debtor asking him to withdraw the money deposited by the former in Court.¹¹
10. Application for revival of previous execution proceedings.¹²

The following have been held not to constitute steps-in-aid of execution —

1. Application for stay of proceedings pending appeal.¹³

2. (1924) A I R 1924 Oudh 177 (178) : 74 Ind Cas 816, *Mathura Singh v. Kandhas Pathak*.
- (1918) A I R 1918 Cal 635 (636) : 40 Ind Cas 1005, *Kedar Nath Dey v. Lakhi Kanta Dey*.

See also Note 117 Foot-Note (4).

4. (1906) 3 All L Jour 815 (816, 818) : 1906 All W N 269, *Lachman Das v. Narain Das*.
5. (1888) 15 Cal 863 (365), *Lalraddi Mulluck v. Kala Chand Bera*.
6. (1905) 1905 Pun L R No. 79 : 1905 Pun Re No. 27 : 1905 Pun W R No. 2, *Sardar Dishes Singh v. Ganga Ram*.
7. (1881) 2 Mad 218 (218), *Nukanna v. Ramasami*.
8. (1918) A I R 1918 Mad 1140 (1141) : 39 Ind Cas 152, *Ghulam Karusha v. Bhuvaraha Iyengar*.
9. (1915) A I R 1915 Mad 314 (315) : 25 Ind Cas 53, *Deireddi Yellamandar v. Chinna Pitsnah*.
10. (1929) A I R 1929 Lah 103 (104) : 114 Ind Cas 55, *Nanak Chand Rama Nand v. Jas Gopal Gokal Chand*.
11. (1911) 9 Ind Cas 337 (339) : 14 Oudh Cas 10, *Jageshar Singh v. Bhugwan Bakhsh Singh*.
12. (1919) A I R 1919 Cal 709 (710) : 64 Ind Cas 727, *Chandra Kumar Dhar v. Ramdin Dhar*.
- (1894) 1894 Pun Re No. 106, *Ghulam Jalani v. Yusuf Shah*.
13. (1923) A I R 1923 Bom 218 (223) : 76 Ind Cas 317, *Pandey Dagaadu v. Jamnadas Chotu Mal*.

2. Application for a reconstruction of a decree destroyed by fire.¹⁴
3. Mere filing of an affidavit by the decree-holder that there are no incumbrances on the property to be sold.¹⁵
4. Application for an ejectment of a tenant against whom a decree for arrears of rent had been passed.¹⁶
5. Application for the amendment of the order absolute for sale.¹⁷
6. Application to withdraw a pending execution petition with leave to institute another at some future time.¹⁸
7. Application by a decree-holder purchaser to receive from him the poundage fee in respect of the property purchased and an application to be allowed to set off the purchase money against the decree.¹⁹
8. Deposit of pre-emption amount.²⁰

129. "Final order." — Under clause 5 of the Article as it stood prior to 1927, the date of the application in accordance with law to the proper Court for execution or to take a step-in-aid of execution, furnished a fresh starting point of limitation independent of the result of the application.¹ Under the amended Article, time has been made to run from the date of the final order on such an application.² In *Khalil Ur Rahman Khan v. Collector of Etah*,³

14. (1934) A I R 1934 Bom 113 (114) : 150 Ind Cas 866, *Ratanchand v. Chandu Lal*.
(1909) 5 Ind Cas 660 (661) (Cal), *Raj Gir Sahay v. Ishwardhari Singh*.
15. (1924) A I R 1924 All 811 (812) : 78 Ind Cas 631, *Chiranjee Lal v. Ganga Sahai*.
16. (1905) 28 All 131 (183) 2 All L Jour 661 · 1905 All W N 213, *Maharani of Dumraon v. Buddha Kunwari*.
17. (1905) 27 All 575 (577) 1905 All W N 108 2 All L Jour 287, *Ahsan-ul-lah v. Dakhini Din*.
18. (1896) 23 Cal 817 (821), *Tarak Chunder Sen v. Gyanada Sundari*.
(1919) A I R 1919 Pat 188 (189) 50 Ind Cas 444, *Syed Rafakat Hussain v. Syed Mehdi Hussain*.
[But see (1893) 16 All 75 (77) 1893 All W N 219, *Ram Narain Rai v. Bakhtu Kuar*.]
19. (1895) 23 Cal 196 (199), *Ananda Mohan Roy v. Hara Sundari*.
20. (1929) A I R 1929 All 953 (957) 51 All 998 · 122 Ind Cas 604, *Anrup Missir v. Ram Harakh*.

Note 129

1. (1914) 1914 Mad W N 64 (64) (S N).
(1891) 18 All 348 (345) 1891 All W N 119, *Jawahar Mal v. Kistur Chand*.
(1896) 1896 Bom P J 763, *Premraj Chandrabhan v. Abdul Rahman*.
(1876) 25 Suth W R 106 (106, 107), *Lala Hurree Sunkur Sahoy v. Krishna Kant Dutt*.

dar Kar.

- (1936) A I R 1936 Rang 271 (272) 163 Ind Cas 403 · 14 Rang 550, *Arjundas Bisumalal v. U Ka Ya*.
- (1937) A I R 1937 Cal 16 (18) 169 Ind Cas 739, *Ananda Lal Chakravartthy v. Sm Katyans Devi*.

nd Cal 747, *Nourangs*

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their Lordships of the Privy Council observed as follows :

"It is to be noted that by the said Article, before amendment, the date of the application for execution was the time from which the period of limitation was to run, and it was not until the amending Act of 1937 was passed that the result of the application, viz., the final order passed on the application, became the material time."

It follows that what is material under the amended Article is thus the date of the *final order* on the application and not the date of the *application* itself.⁴ The question consequently arises as to what is the meaning of the expression "final order" for the purpose of clause 5 of this Article. The word "order" has been defined in Section 2 sub-section 14 of the Code of Civil Procedure as meaning the formal expression of any decision of a Civil Court which is not a decree. The Code and the Limitation Act being enactments in *pari materia*, the word "order" in this Act must be construed as having the same meaning as it has under the Code, unless, of course, there are sufficient reasons to the contrary.⁵ It has been held that the "order" need not be one passed on the merits;⁶ nor need it be a *judicial determination* of the matter involved in the application.⁷ The contrary view which has been held in some cases,⁸ namely, that the order must be a judicial one is, it is submitted, not correct.

But, in order to give a fresh starting point of limitation under clause 5, it is necessary that the order must be a "final" one. The word "final" means "pertaining to the end or conclusion" and refers to that which brings with it an end.⁹ In other words, it is used in

4. (1938) A I R 1938 Mad 118 (115) : I L R (1938) Mad 826 : 176 Ind Cas 733, *Maithu Rama Reddi v. Motilal Daga*.

(1937) A I R 1937 Mad 885 (891) : I L R (1937) Mad 616 : 168 Ind Cas 561 (F F), *Chidambara Nadar v. Rama Nadar*.

(1936) A I R 1936 Pat 318 (314) : 162 Ind Cas 984, *Bhagwant Saks v. Ram Saksat Ram*.

(1935) A I R 1935 All 757 (757) : 154 Ind Cas 718, *Hafiz Uddin v. Farshadi Lal-Masrokar Lal*.

(1932) A I R 1932 Oudh 148 (148) : 7 Luck 590 : 137 Ind Cas 768 (F F), *Ram Bhairav v. Ramnath Lal*.

5. See Note 18 of the Preamble to this Act.

6. (1938) A I R 1938 Mad 118 (115) : I L R (1938) Mad 826 : 176 Ind Cas 733, *Maithurama Reddi v. Motilal Daga*.

(1937) A I R 1937 Mad 885 (892) : I L R (1937) Mad 616 : 168 Ind Cas 561 (F F), *Chidambara Nadar v. Rama Nadar*.

(1936) 1936 Mad W N 547 (548), *Mettaya Padayacki v. Rajagopalra*.

7. (1938) A I R 1938 Mad 118 (115) : I L R (1938) Mad 826 : 176 Ind Cas 733, *Maithurama Reddi v. Motilal Daga*.

(1937) A I R 1937 Mad 885 (893) : I L R (1937) Mad 616 : 168 Ind Cas 561 (F F), *Chidambara Nadar v. Rama Nadar*, (Per Pandurang Rao J.)

(1936) A I R 1936 All 820 (824) : I L R (1937) All 272 : 166 Ind Cas 106 (F F), *Mohammad Taji Khan v. Raja Ram*.

8. (1936) A I R 1936 Mad 618 (614) : I L R (1937) Mad 112 : 163 Ind Cas 834, *Kesarnath v. Official Receiver, West Tanjore*.

(1936) A I R 1936 Pat 318 (314) : 162 Ind Cas 984, *Bhagwant Saks v. Ram Saksat Ram*.

9. Webster's Dictionary.

contradistinction to the word "interlocutory."¹⁰ It has accordingly been held generally that a final order implies that the *proceeding has been terminated* so far as the Court passing it is concerned, though the order need not be a judicial determination of the rights of the parties.¹¹ In *Mohammad Taqi v. Raja Ram*,¹² an order was made in the following terms: "Execution struck off for partial satisfaction of the decree. Costs on the judgment-debtors" The question was whether the order was a final one or was merely a provisional one suspending the application for a time. It was held by the Full Bench that the question whether an execution case is still pending or has been terminated by an order must depend upon an interpretation of the order and the inference to be drawn as to the Court's intention and that the order striking off in the particular case was one which terminated the proceeding and was therefore a final order. Their Lordships observed as follows:

"We are unable to hold that the words "final order" must mean the order which finally adjudicates upon the rights of the decree-holder on the one hand and the rights of the judgment-debtor on the other

"If that were the meaning, then it may in some cases work hardship on the decree-holders themselves. In the absence of any such order, time would still begin to run from the date of the last application made in accordance with the law or step taken in aid of execution, whereas the amended clause 5 appears to have been intended to give to the decree-holder a fresh start from the date when the last execution matter or proceeding terminated. Again, there may be cases where the decree-holder may himself not like to go on with the application and may get it dismissed. It would be too much to hold that in such a case, as there has been no proper adjudication upon the rights of the parties, he cannot have a fresh start for purposes of limitation. Again, the application may be dismissed on account of want of prosecution or default or for some other reason. In all such cases the execution proceeding must be deemed to have terminated and the order passed thereon a final order, though there

10 Wharton's Law Lexicon.

(1934) A I R 1934 Pesh 23 (24) 149 Ind Cas 136, *Punjab National Bank, Ltd. v. Dina Nath*.

11. (1934) A I R 1934 Pesh 23 (24) . 149 Ind Cas 136, *Punjab National Bank, Ltd. v. Dina Nath*.

(1936) A I R 1936 Mad 613 (614) . I L R (1937) Mad 112 . 163 Ind Cas 354, *Kesavuloo v. Official Receiver, West Tanjore*.

(1933) A I R 1933 Rang 87 (88) : 142 Ind Cas 435, *Kadresan Chettiyar v. Maung San Ya*.

(1938) A I R 1938 Mad 113 (115) I L R (1938) Mad 326 : 176 Ind Cas 753, *Muthurama Reddi v. Motilal Daga*

(1937) A I R 1937 Mad 385 (392) I L R (1937) Mad 616 : 168 Ind Cas 561 (F B), *Chidambara Nadar v. Rama Nandar*, (Per Venkataramana Rao, J)

(1932) A I R 1932 Oudh 148 (151) 7 Luck 590 187 Ind Cas 768 (F B), *Ram Bharosey v. Ramman Lal*.

12. (1936) A I R 1936 All 820 (824) . ILR (1937) All 272 166 Ind Cas 106 (F B).

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has been really no adjudication upon the rights of the parties, and the matter can be re-agitated on a fresh application being made to the execution Court. *We think that where the Court intends to dispose of the matter completely and no longer keep it pending on its file*, and does not merely suspend the execution or consign the record to the record room for the time being, the order must be deemed to be a final order which will give a fresh start for purposes of limitation, and that the proceeding not being pending, there would in such a case be no question of revival."

Thus, where the decree-holder applied for execution asking for issue of a notice to the judgment-debtor and an order is made issuing such notice which was made returnable twelve days later and on the said date the case was closed at the decree-holder's request, it was held by the High Court of Rangoon that the final order was the order closing the case which terminated the proceedings and not the order issuing the notice.¹³ Where a petition was returned for amendment and on re-presentation it was *rejected*, it was held by the High Court of Madras that the order of rejection terminated the proceedings so far as the Court was concerned and that it was final order.¹⁴

See also the case cited below.¹⁵

There is a conflict of opinion on the question whether an order *returning* an application for amendment constitutes a "final order" within the meaning of clause 5 of this Article. It has been held in the undermentioned cases¹⁶ that it is a final order, the ground of such view being that the expression "final order" meant the *last order in point of time*. But this view has been dissented from in other cases¹⁷ which, as has been seen already, hold that the words "final order" refer to an order which terminates the proceeding so far as the Court passing it is concerned and that an order returning the application for correction does not terminate the proceeding. In *Municipal*

13. (1933) A I R 1933 Rang 87 (88) : 142 Ind Cas 435, *Kadiresan Chelliar v. Maung San Ya*.

14. (1937) A I R 1937 Mad 385 (392) : I L R (1937) Mad 616 : 168 Ind Cas 561 (F B), *Chidambara Nadar v. Rama Nadar*.

15. (1935) A I R 1935 All 909 (910) : 157 Ind Cas 273, *Maresh Prasad v. Shyam Lal*. (Petition dismissed after recording part payment—Decree-holder granting two months' time—Date of final order is of date of dismissal and not that at the end of two months.)

16. (1936) 1936 Mad W N 547 (547), *Shunmuga Pathar v. Swaminatha Pathar*.
(1936) 1936 Mad W N 547 (548), *Mottayya Padayachi v. Rajagopalan*.
(1937) A I R 1937 Mad 385 (392) : I L R (1937) Mad 616 : 163 I. C. 561 (F B), *Chidambara Nadar v. Rama Nadar*. (Per Pandrang Row, J.)

17. See cases cited in Foot-Note (11) above.
(1936) A I R 1936 Mad 613 (614) : I L R (1937) Mad 112 : 163 Ind Cas 354, *Kesavuloo v. Official Receiver, West Tanjore*.

[See also (1933) A I R 1933 Mad 540 (540) 144 I. C. 167, *Muhammad Abu Bakkar Maracair v. Ramakrishna Chelliar*. (Assumed.)]

Council, Tanjore v. Sundaresan,¹⁸ it was held that where a petition is returned and not re-presented, the proper way to deal with it is to treat it as not having come into existence at all. In *Kesavuloo v. Official Receiver, West Tanjore*¹⁹ it was held that when an order is made returning the application, it does not deal judicially with the matter of the petition but contemplates a final order to be passed at a subsequent stage when the defects are remedied and the petition is re-presented and that consequently it is not a final order within the meaning of this clause. It is submitted that the last two views are not correct. As to the first of the two views, it may be stated that before the amendment of 1927, an application was considered to have been presented notwithstanding it was returned and not re-presented at all. It is not clear why, under the Article as amended, an application, returned for correction, should be regarded as not having been presented at all. As to the view in *Kesavuloo's case*,¹⁹ it has been seen already that it has been held in a number of cases that the order need not be a judicial determination of the matter in dispute.

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But, though a final order means an order that terminates the proceeding so far as the Court passing it is concerned, it is not clear why an order returning the application should not be regarded as terminating the proceeding. In the undermentioned case,²⁰ no doubt, it was held that an application returned for amendment and not re-presented must be considered to be pending till re-presented by the decree-holder, but this view has not been accepted in a number of other cases.²¹ It is difficult to regard a petition that has been returned as being a pending one as long the decree-holder considers it convenient not to re-present it. If then, it is not pending, it must necessarily have been disposed of and the order that disposed of it was the order returning the petition, which would therefore be a final order. The fact that when the petition is re-presented it would be deemed to have been presented on the date when it was first presented, does not necessarily raise the inference that the application was pending during the interval.

Where the final order on an application is appealed against, the order of the Appellate Court in such appeal will be the final order under the clause which will give a fresh starting point of time.²²

130. Order transferring decree for execution. — An order transferring a decree for execution to another Court is a "final order"

18. (1930) 1939 Mad W N 426 (427).

19. (1936) A I R 1936 Mad 618 (614) I L R (1937) Mad 112 163 Ind Cas 354.

20. (1933) A I R 1933 Mad 540 (540) 144 Ind Cas 167, *Muhammad Abu Bakhar Maracay v. Ramakrishna Chelliar*

21. (1936) 1936 Mad W N 517 (517), *Shanmuga Pathar v. Suaminatha Pathar*.

(1939) 1939 Mad W N 426 (427), *Municipal Council, Tanjore v. Sundaresan*.

[See also (1936) 1936 Mad W N 517 (518), *Mottaya Padayachi v. Rajagopalan*. (Assumed)]

22. (1935) 157 Ind Cas 604 (604) (Lah), *Abhe Ram v. Bhola*.

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within the meaning of clause 5 of the Article, inasmuch as so far as the Court transferring the decree is concerned, the proceeding is terminated by the order.¹ In *Bhagwat Sahay v. Ram Sukrit Ram*,¹ Wort, J., while feeling himself bound by the previous decisions of the Patna High Court to the above effect, expressed his own view that such an order would not be a "final order" on the ground that a "final order" meant a judicial order. In *Hafiz Uddin v. Parshadi Lal Manohar Lal*,² it was held that the date of the final order in such cases was the date on which the certificate of transfer was handed over to the decree-holder and not the date on which the Court directed the office to prepare the certificate of the transfer.

130a. Order returning application.—See Note 129 *ante*.

131. Final order need not be in accordance with law.—Clause 5 merely requires that there should be a final order on an application in accordance with law. Where there is no application in accordance with law, no fresh starting point is given by any order passed on such application.¹ It is, however, only the *application* that should be in accordance with the law. It is not necessary that the *order* on the application should be in accordance with law in order to give a fresh starting point of limitation.²

131a. Retrospective operation of amendment of clause 5.—The amendment of the year 1927 will not operate retrospectively so as to affect vested rights, but will otherwise govern all applications filed after the date of the amendment. Where an application, filed on 24.4.1925 was dismissed on 8.8.1925 and the next application for execution was filed on 8.8.1928, the amendment having come into force in the meanwhile on 1.1.1928, it was held by the High Court of Patna that the application was within time having been made on the last day of the period of three years calculated from 8.8.1925, the date of the final order on the last application.¹

CLAUSE 6.

132. Clause 6.—This clause was substituted by Act 9 of 1927 for the old clause which ran as follows :

"(Where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom

Note 130

1. (1934) A I R 1934 Pesh 23 (24) : 149 Ind Cas 136, *Punjab National Bank, Ltd. v. Dina Nath*.
2. (1936) A I R 1936 Pat 313 (314) : 162 Ind Cas 984.
3. (1935) A I R 1935 All 757 (758) : 154 Ind Cas 718.

Note 131

1. (1937) A I R 1937 Mad 760 (762) : 174 Ind Cas 28, *Appaji Chetti v. Gorindaswami Reddi*.
2. (1934) A I R 1934 Rang 101 (103) : 149 Ind Cas 98, *U Nyo v. U Po Hlaing*.

Note 131a

1. (1930) A I R 1930 Pat 207 (207) : 127 Ind Cas 572, *Sapani Patra v. Damodar Kar*.

execution is applied for to show cause why the decree should not be executed against him, when the issue of such a notice is required by the Code of Civil Procedure, 1908."

In view of the fact that by the same Act clause 5 was amended so as to make time run from the date of the *final order* on an application for execution or to take a step-in-aid of execution, and not from the date of the application as the case was before, the above clause 6 was repealed and in its place was enacted the present clause 6. As to the cases decided under the repealed clause 6, see the undermentioned decisions.¹

CLAUSE 7.

133. Clause 7—General.—This clause provides that where the application is for the enforcement of a payment which the decree or

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Note 132

1. (1893) 1893 Bom P J 112, *Dattu v. Narayan Balaram*.
- (1932) A I R 1932 Pat 222 (224) 138 Ind Cas 91 11 Pat 546, *Sheogobind Ram v. Mt. Kishunbansi Kuer*.
- (1933) A I R 1933 Pat 658 (662) 18 Pat 86 147 Ind Cas 101, *Mrs Lal v. Rajkshore Narain Singh*.
- (1916) A I R 1916 Mad 728 (730) 39 Mad 923 30 Ind Cas 707, *Varadaraja Mudali v. Murugesan Pillai*.
- (1922) A I R 1922 Pat 597 (598) 1 Pat 609 69 Ind Cas 668, *Gobardhan Das v. Satish Chandra*.
- (1926) A I R 1926 Pat 160 (162) 90 Ind Cas 847, *Jogendra Prasad Narayan Sinha v. Mangal Prasad Sahu*.
- (1892) 1892 All W N 71 (72), *Faz ullah Khan v. Amin-ud-din Khan*.
- (1910) 8 Ind Cas 377 (378) 13 Oudh Cas 303, *Mohammad Abdul Karim Khan v. Nawaz Singh*.
- (1929) A I R 1929 All 795 (797) 118 Ind Cas 237, *Moti Lal v. Champa Lal*.
- (1905) 1905 Pun L R No 57 1905 Pun R No 22 1905 Pun W R No. 33, *Muhammad Nawaz Khan v. Ram Das*.
- (1897) 11 C P L R 157 (160), *Mukund Ram Sukal v. Harnaram*.
- (1894) 1894 All W N 96 (96), *Parmeshwars Das v. Baij Nath*.
- (1918) A I R 1918 Mad 580 (584) 40 Mad 1069 42 Ind Cas 294 (F B), *Pierce Leslie & Co Ltd v. Perumal*.
- (1919) A I R 1919 Oudh 370 (371) 51 Ind Cas 549 22 Oudh Cas 32, *Gaya Prasad v. Gur Dayal*.
- (1876) 1876 Pun R No. 89, *Sulekh Chand v. Adjudhia Pershad*.
- (1914) A I R 1914 All 296 (297) 25 Ind Cas 738, *Maharaja of Jaipur v. Lalji Sahai*.
- (1927) A I R 1927 Pat 218 (219) 103 Ind Cas 39 6 Pat 277, *Diswambar Nath v. Mahesh Sahi*.
- (1918) A I R 1918 Pat 457 (457) 45 Ind Cas 203, *Khoda Buksh v. Bahadur Ali*.
- (1925) A I R 1925 Pat 474 (476) 87 Ind Cas 531 5 Pat 1 (F B), *Adaya Prasad Singh v. Ram Narayan Das*.
- (1916) A I R 1916 Pat 205 (206) 36 Ind Cas 999, *Ram Kumar Lal v. Kesheo Prasad Singh*.
- (1928) A I R 1928 Cal 241 (242), *Sultan Hasan v. Nanki Bibi*.
- (1905) 27 All 575 (576) 1905 All W N 108 2 All L Jour 287, *Ahsan-ul-lah v. Dalkini Din*.
- (1925) A I R 1925 Lah 233 (235) 78 Ind Cas 241, *Firm Sheru Mal Chma Mal v. Firm Hira Lal Anani Ram*.
- (1894) 9 C P L R 15 (16), *Rai Bahadur Mukund Balkrishna Buty v. Lahya Mahar*.
- (1919) A I R 1919 Low Bur 132 (132) 52 Ind Cas 937, *Isakut v. Mt. Hla Mo We*.

See also the Authors' Civil Procedure Code, Order 21 Rule 22 Note 13.

Article 182
(Clause 7)
Notes 133-134

order directs to be made on a certain date, the period of limitation under this Article will begin to run from such date. Hence, where different dates are provided in the decree, for the payment of different portions of the decretal amount, there will be a distinct and separate starting point of limitation in regard to each of such portions of the decretal amount, so that in such cases there will be different starting points of limitation in regard to the same decree. In this respect, this clause differs from the other clauses of the Article under all of which limitation runs in respect of the decree as a *whole* and not in regard to particular portions of it alone at a time.¹

This clause applies only to the *first* application for the recovery of a payment due under a decree. A subsequent application in respect of the *same* payment will come under clause 5, *supra*.²

The Act of 1859 did not contain any provision analogous to this clause. Still, it was held under that Act that limitation for the execution of an instalment decree ran in respect of each instalment from the date on which such instalment fell due.³

134. "Payment which the decree or order directs to be made at a certain date."—A decree directing maintenance to be paid annually on a certain date is an instance of a decree directing payment to be made on a certain date within the meaning of clause 7.¹

A decree provided that a sum of Rs. 1650 should be paid to the plaintiff at the end of five years from the decree. It was further provided that in lieu of the interest on Rs. 1200 out of this sum, the plaintiff should be in possession of a certain house belonging to the defendant and that the defendant should pay annually to the plaintiff the interest on the remaining Rs. 450 at a certain rate. The decree also contained a provision that if the defendant failed to pay the interest as provided, the plaintiff might execute the decree in respect of the Rs. 450 and the interest due thereon. It was held

Note 133

1. (1911) 10 Ind Cas 552 (554): 36 Mad 104, *Vaidyanatha Iyer v. Subramania Pattar*.
2. (1938) A I R 1938 All 210 (211): I L R (1938) All 342: 175 Ind Cas 156, *Latafat Ali Khan v. Kalyan Mal*.
3. (1867) Agra F B 89 (85), *Ullaf Ali Khan v. Ram Lal*.
 (1869) 6 Bom H C R 45 (48), *Uttam Ram Manik Ram v. Girdharul Motiram*.
 (1885) 1885 Bom P J 22, *Ramapa v. Krishnaya*.
 (1871) 15 Suth W R 547 (547), *Ram Sudoy Ghose v. Raj Bullubh Saha*.
 (1875) 23 Suth W R 41 (41), *Tincowree Dossee v. Umbika Chunder Roy Chowdhry*.
 (1870) 1870 Pun Re No. 52, *Chundoo Lall v. Mt. Surfeas Mehal Begam*.
 [But see (1869) 4 Mad H C R 275 (276), *Lakshmi Ammal v. Seshadri Iyengar*.]

Note 134

1. (1894) 18 Mad 462 (463), *Kuppu Ammal v. Saminatha Ayyar*.

by the Punjab Chief Court that the provision enabling the decree-holder to realize a portion of the amount decreed on failure by the judgment-debtor to pay the stipulated interest on that portion at the stipulated time, did not amount to a direction in the decree within the meaning of the clause that the said portion was to be paid on the failure to pay interest.²

Article 182
:(Clause 7)
Note 134

A decree provided that if the decretal amount was paid on a certain date, no interest would be payable, that if the decretal amount was paid on a certain other date, interest at a certain rate would be payable and that if the sum was paid on a still other date which was mentioned, interest at a certain other rate would be payable. It was held that the terms of the decree regulating the rate of interest payable thereunder with reference to certain dates could not be deemed to be a direction by the Court for payment on specified dates.³

An order subsequent to a decree postponing the date on which payment under the decree should be made or providing for the payment of the decretal amount by instalments, must be held to modify the decree, and an application for the enforcement of payment in accordance with such order will be an application for the enforcement of payment which the decree directs to be made at a certain date.⁴ But, where subsequent to the decree the parties presented a petition to the Court stating that they had entered into a compromise under which the decretal amount was to be paid in certain instalments and the Court directed the petition to be filed, it was held that the order did not amount to one directing the decretal amount to be paid by instalments.⁵ In the undermentioned case⁶ it was held that an order staying execution of a decree till the disposal of a suit between the same parties pending in the same Court, cannot be treated as having the effect of *varying* the decree so as to make it one directing the payment of the decretal amount at a certain date.

A decree directing a certain sum to be paid at a certain date and providing that in default certain properties which were in the possession of the defendant must be made over to the plaintiff, will come within this clause.⁷

But, it has been held that a decree on a mortgage directing the sale of the mortgaged properties in default of payment of the mortgage money on or before a certain date, is not a decree *directing* any payment to be made at a certain date.⁸

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Article 182
(Clause 7)
Note 135

135. "Certain date." — These words refer to a date which, at the date of the decree or order, is certain. A date which can become certain only at a future time will not be a "certain" date within the meaning of clause 7. Thus, where a mortgage decree provides that if on the sale of the mortgaged properties the sale proceeds are not sufficient to cover the decretal sum, the balance should be realized from the person of the judgment-debtor and from his other properties, the decree cannot be regarded as directing such balance to be paid at a "certain" date.¹ Similarly, where a decree provides for the payment of the decretal amount by certain instalments but contains a clause that if default be made in regard to one or more instalments the entire amount remaining due under the decree should become immediately payable, the provision as to the payment of the entire decretal sum on default in the payment of instalments cannot be treated as a direction for the payment of such sum at a "certain" date. (See Note 136 *infra*.)

The undermentioned decision,² which is inconsistent with the above principle, is, it is submitted, not correct.

In *Joti Prasad v. Srichand*,³ Sulaiman, Ag. C. J., observed as follows :

"The corresponding clause in the Act of 1871 contained the expression 'specified date'. That necessarily connoted the idea that the exact date should be mentioned in the decree. The substitution of the word "certain" in place of "specified" widens the scope of its meaning. It is no longer necessary to mention by the year, month and day the exact date in the decree. All the same the date fixed for payment must be a certain date. In my opinion, the word "certain" is used in contradistinction to "uncertain." It is not used in the sense in which one might say that a certain man came to see me. It obviously means a date, which, though not expressly mentioned or ascertained, must certainly occur. The word "certain," in my opinion, is a contrast of the word "uncertain" as that word is used, for instance, in Sections 32 and 33, Contract Act, or Sections 21 and 23, Transfer of Property Act.

"In the present case (which was a case of an instalment decree with a default clause providing that on two consecutive defaults being made the whole amount must become payable) at the time when the decree was passed, it could not be known definitely and it was not at all certain whether two consecutive defaults would be made by 1921. If the judgment-debtors went on paying the instalments regularly, there would never be any

Note 135

1. (1917) A I R 1917 P C 85 (85) : 45 Ind Cas 436, *Khulna Loan Co Ltd. v. Janendra Nath*. (Affirming A I R 1915 Cal 8)
- (1915) A I R 1915 Cal 8 (8) : 24 Ind Cas 25, *Janendra Nath Bose v. Khulna Loan Co. Ltd.*
2. (1933) A I R 1933 Lah 590 (592), *Nanu Mal v. Amar Nath*.
3. (1923) A I R 1928 All 629 (634) : 112 Ind Cas 73 : 51 All 237 (F B).

default. It is therefore impossible, in my opinion, to say that the decree had fixed a 'certain' date for the payment of the whole amount in a lump sum. Such a date was not at all certain. It was dependent on the contingency of two consecutive defaults happening. The date might or might not come at all. No doubt it is now known that the defaults were made and a date arrived when the default clause could be enforced, but this was not certain *when the decree was passed*."

But, as pointed out in the above passage, the decree need not expressly specify the exact date by the year, month and day. The date may be indicated in *any* way by the decree.⁴ Thus, a decree directing the payment of money on the plaintiff attaining his majority will come under this clause.⁵ Similarly, it has been held that a decree directing a certain sum to be paid to the plaintiff annually or monthly, without specifying the exact date, will be governed by this clause.⁶ It has been held that in such cases the decree must be deemed to direct the payment to be made on the day year or the day month (as the case may be) from the date of the decree and thenceforward on the corresponding date year after year or month after month.^{6a}

A simple decree for money which does not fix, expressly or impliedly, any date for the payment of the money will not come within this clause, although in such cases the money is payable immediately on the decree being passed.⁷

4. (1890) 14 Mad 396 (399), *Katers v. Venkamma*.

5. (1936) A I R 1936 P C 809 (311) 164 Ind Cas 337 63 Ind App 429 (P C), *Murugesam Pillai v. Minakshisundara Ammal*. (Confirming A I R 1935 Mad 107.)

6. (1887) 12 Bom 65 (68), *Lakshmi Bai Dapuji v. Madharav Dapuji*.

(1896) 1896 Bom P J 493, *Dhondo v. Chinto*. (A decree for one half share in a Varsashan must be construed as a decree ordering payment to be made annually.)

(1906) 80 Mad 504 (506) 17 Mad L Jour 402, *Astamma v. Narayana Bhatta*. (A decree directing the defendants to pay plaintiff's maintenance at a certain rate per annum or mensem from the date of the plaint is a decree for payment on the corresponding date or month every year.)

(1890) 14 Mad 396 (399), *Katers v. Venkamma*. (Do.)

(1892) 1892 Pun Re No 13 (F B), *Nawabzada Muhammad Kamaruddin Khan v. Piar Lal*.

[See (1876) 1876 Bom P J 277, *Malhar Rajaram v. Ahmed Sahab*. (Decree for payment of annuity—Clause in Art 167 of the Act of 1871 was held to apply.—It is treated as a decree directing the payment of an instalment at a specified date.)]

[But see (1884) 7 Mad 83 (84), *Yusuf v. Sardar* (Following 7 Mad 80.)]

6a (1888) 12 Bom 65 (67), *Lakshmi Bai Dapuji v. Madharav Dapuji*.

out altering the effect, so that such payment is one to be made at a certain date.)]

7. (1928) A I R 1928 All 629 (636) 112 Ind Cas 73 51 All 237 (F B), *Joti Prasad v. Srichand*. (Per Mukerji J.)

Article 133
(Clause T)
Notes 135-136

In the undermentioned case¹ it was held that a decree directing the payment of money "within" a certain period will not come within this clause. It is submitted that the correctness of this view is open to question, inasmuch as in such cases the decree may be deemed to direct the payments to be made on the last day of the period.

See also the undermentioned decision.²

135. Instalment decree.—Where the decretal amount is directed to be paid in certain instalments at certain dates, an application for the enforcement of the payment of any of the instalments will be governed by this clause as being an application for the enforcement of a payment which the decree directs to be paid at a certain date. Hence, each instalment is recoverable under this clause by an application made within three years of the date on which such instalment falls due under the decree. The fact that the application is made after three years from the date on which earlier instalments fell due will not bar the application.³

The above principle applies also to cases in which the instalment decree provides that on default being made in regard to one or more instalments, the entire amount under the decree should become payable. Hence, even in such cases an application for the enforcement of the payment of each instalment will be governed by this clause and time in respect of each instalment will run from the date on which such instalment falls due.⁴

But, where the application is not for the enforcement of the payment of any instalment under the decree but for the enforcement of the *default clause* which makes the entire amount under the decree payable immediately without reference to the instalments,

5. (1885) 1885 All W N 103 (189), *Chaita Prasad v. Sita Saha*.

3. (1899) 23 Bom 522 (534) : 1 Bom L B 31, *Murari v. Keshari*. (Where a decree directs payment to be made within a month or at a time in succeeding years without mentioning any limit for that time or directing enforcement in default of payment, it must be taken as operating from its date and to be enforceable only within three years from that time unless kept alive by applications for execution made according to law within the prescribed periods.)

Note 135

1. (1882) 1882 All W N 171 (172), *Chaita Gop v. Chaita Prasad*.
 (1892) 17 Ind Cas 292 (293) (Cal), *Gopa Das Chaita Gop v. Bansi Das Sri Krishna Das*.
 1905, 1905 Pan L B No. 57 : 1905 Pan Sa No. 22 : 1905 Pan W R No. 57, *Maharajah Nitram Kaur v. Bani Das*.
 1900, 1900 Pan L B No. 45, *Bani Das v. Harjogal Sarda*.
 1900, 1900 Pan L B = 415 : 1900 Pan Sa No. 45, *Kailash Chait v. Nalin*.
 1901, A I R 1901 Cal 379 (381) : 1901 Ind Cas 625 : 23 Luck 342, *Chaita Prasad Sarda v. Mahendra Prasad*.
 2. (1924) A I R 1924 All 729 (734), 737, (738) : 51 All 277 : 111 Ind Cas 73 (75) : 111 Ind Cas 73 (75), *Chaita Prasad v. Sri Chaita*.
 1928, A I R 1928 All 212 (212) : 273 Ind Cas 126 : 111 B (1928) All 32, *Chaita Prasad v. Bansi Das*.
 1927, A I R 1927 Cal 473 (477) : 196 Ind Cas 774 : 21 Luck 373 (774), *Chaita Prasad v. Bansi Das*.

the application will not come under this clause.³ The reason is that in such a case the amount, the payment of which is sought to be enforced, is not directed by the decree to be paid at a *certain* date. Such amount becoming due under the decree only on the default being made, the question whether it *will* become due or *when* it will become due cannot, at the date of the decree, be capable of a certain answer. The view taken in some decisions that this clause applies even to an application for the enforcement of the *default clause* in such cases is, it is submitted, not correct.⁴ On the principles discussed in Note 26 *ante*, clause 1 also will not apply to such an application and it will therefore come under Article 181.⁵

Article 182
(Clause 7)
Note 136

The question has arisen as to when limitation *begins to run* for such an application. The general trend of decisions is to the effect that time begins to run from the *earliest* default,⁶ unless the decree-holder has waived the benefit of the provision with reference to such default, in which case time will begin to run from the next default with reference to which there is no such waiver.⁷ The correctness of this view is, however, thrown into doubt, by the decision of the Privy Council in *Maung Sin v. Ma Tok*.⁸

3. (1928) A I R 1928 All 629 (634, 636) : 51 All 237 : 112 Ind Cas 73 (F B), *Joti Prasad v. Sri Chand*.
4. (1916) A I R 1916 All 239 (240) : 38 All 204 : 32 Ind Cas 590, *Chattar Singh v. Amir Singh*. (Confirming in Letters Patent Appeal : A I R 1915 All 311.)
5. (1928) A I R 1928 All 629 (635) : 51 All 237 : 112 Ind Cas 73 (F B), *Joti Prasad v. Sri Chand*.
6. (1935) A I R 1935 All 259 (261) : 157 Ind Cas 1052, *Hari Ram v. Hsman Lal*.
(1934) A I R 1934 All 534 (538) : 149 Ind Cas 598, 56 All 921, *Ram Prasad v. Jadhunandan Upadhyay*.
(1916) A I R 1916 All 239 (240) : 38 All 204 : 32 Ind Cas 590, *Chatter Singh v. Amir Singh* (Confirming in Letters Patent Appeal in A I R 1915 All 311)
7. (1877) 2 Bom 356 (360), *Dulsook Rattanchand v. Chugon Narrun*.
(1881) 7 Cal 56 (60) : 5 Ind Jur 525, *Asmutullah Dalal v. Kally Churn Mitter*.
(1918) A I R 1918 Sind 68 (69) : 11 Sind L R 120 : 45 Ind Cas 324, *Firm of Bhawandas Ferroomal v. Meghraj*.
[But see (1934) A I R 1934 Oudh 334 (336) : 149 Ind Cas 603 : 9 Luck 602, *Lal Bahadur v. Mathura Prasad*]
8. See (1925) A I R 1925 Cal 1012 (1015) : 86 Ind Cas 1051 : 54 Cal 143, *Jahim Chand v. Yusufali Choudhury*.
(1903) 27 Bom 1 (10, 12, 13) : 4 Bom L R 688 (F B), *Kashiram v. Pandu*
(1920) A I R 1920 Bom 71 (73) : 44 Bom 840 : 53 Ind Cas 65, *Amrit Khanderao Kango v. Govind Ramachandra*.
(1883) 5 All 289 (292, 293) : 1883 All W N 33, *Radha Prasad Singh v. Bhagwan Rai*.
(1889) 11 All 482 (485) : 1889 All W N 186, *Buddhu Lal v. Rakhhab Das*.
(1926) A I R 1926 Cal 212 (213) : 85 Ind Cas 784, *Kalicharan Roy v. Mohesh Chandra Ghosh*.
(1920) A I R 1920 Sind 25 (26) : 59 Ind Cas 607 : 14 Sind L R 123, *Bahadur Dino v. Galomal*.
(1869) 11 Suth W R 570 (571) : 2 Beng L R A C 845, *Upendra Mohan Tagore v. Takalia Bepari*.
8. (1927) A I R 1927 P C 146 (147) : 101 Ind Cas 736 : 5 Rang 422 : 54 Ind App 272 (P O).

Article 182
(Clause 7)
Notes 135-136

In the undermentioned case⁸ it was held that a decree directing the payment of money "within" a certain period will not come within this clause. It is submitted that the correctness of this view is open to question, inasmuch as in such cases the decree may be deemed to direct the payment to be made on the last day of the period.

See also the undermentioned decision.⁹

136. Instalment decree.—Where the decretal amount is directed to be paid in certain instalments at certain dates, an application for the enforcement of the payment of any of the instalments will be governed by this clause as being an application for the enforcement of a payment which the decree directs to be paid at a certain date. Hence, each instalment is recoverable under this clause by an application made within three years of the date on which such instalment falls due under the decree. The fact that the application is made after three years from the date on which earlier instalments fell due will not bar the application.¹

The above principle applies also to cases in which the instalment decree provides that on default being made in regard to one or more instalments, the entire amount under the decree should become payable. Hence, even in such cases an application for the enforcement of the payment of each instalment will be governed by this clause and time in respect of each instalment will run from the date on which such instalment falls due.²

But, where the application is not for the enforcement of the payment of any instalment under the decree but for the enforcement of the *default clause* which makes the entire amount under the decree payable immediately without reference to the instalments,

8. (1885) 1885 All W N 193 (193), *Lalla Prasad v. Shoo Sahas*.

9. (1899) 23 Bom 592 (594) . 1 Bom L R 31, *Maruti v. Krishna*. (Where a decree directs payment to be made within a month or at a time in succeeding years without mentioning any limit for that time or directing foreclosure in default of payment, it must be taken as operating from its date and to be enforceable only within three years from that time unless kept alive by applications for execution made according to law within the prescribed periods)

Note 136

1. (1881) 1881 All W N 171 (171), *Chedu Gir v. Chotu Panda*.
 (1931) 187 Ind Cas 292 (292) (Iah), *Gopi Ram Jaitlu Ram v. Ramji Das Sri Krishan Das*.
 (1905) 1905 Pun L R No. 57 . 1905 Pun Re No. 22 : 1905 Pun W R No 33, *Muhammad Nawaz Khan v. Ram Das*.

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2. (1923) A I R 1923 All 629 (634, 637, 638) : 51 All 237 : 112 Ind Cas 73 (F F) *Joti Prasad v. Sri Chand*.
 (1939) A I R 1939 All 210 (211) : 175 Ind Cas 186 : I L R (1939) All 312, *Latafat Ali Khan v. Kalyan Mal*.
 (1935) A I R 1935 Oudh 465 (467) : 156 Ind Cas 764 : 11 Luck 276 (F D). *Ajodhya Prasad v. Bans Lal*.

the application will not come under this clause.³ The reason is that in such a case the amount, the payment of which is sought to be enforced, is not directed by the decree to be paid at a certain date. Such amount becoming due under the decree only on the default being made, the question whether it will become due or when it will become due cannot, at the date of the decree, be capable of a certain answer. The view taken in some decisions that this clause applies even to an application for the enforcement of the *default clause* in such cases is, it is submitted, not correct.⁴ On the principles discussed in Note 26 *ante*, clause 1 also will not apply to such an application and it will therefore come under Article 181.⁵

The question has arisen as to when limitation begins to run for such an application. The general trend of decisions is to the effect that time begins to run from the *earliest* default,⁶ unless the decree-holder has waived the benefit of the provision with reference to such default, in which case time will begin to run from the next default with reference to which there is no such waiver.⁷ The correctness of this view is, however, thrown into doubt, by the decision of the Privy Council in *Maung Sin v. Ma Tok*.⁸

3. (1928) A I R 1928 All 629 (634, 636) . 51 All 237 . 112 Ind Cas 73 (F B), *Joti Prasad v. Sri Chand*.
4. (1916) A I R 1916 All 239 (240) : 38 All 204 . 32 Ind Cas 590, *Chattar Singh v. Amir Singh*, (Confirming in Letters Patent Appeal . A I R 1915 All 311.)
5. (1928) A I R 1928 All 629 (635) : 51 All 237 : 112 Ind Cas 73 (F B), *Joti Prasad v. Sri Chand*.
6. (1935) A I R 1935 All 259 (261) . 157 Ind Cas 1052, *Hari Ram v. Hsman Lal*.
(1934) A I R 1934 All 534 (538) . 149 Ind Cas 593, 56 All 921, *Ram Prasad v. Jadhunandan Upadhye*.
(1916) A I R 1916 All 239 (240) . 38 All 204 : 32 Ind Cas 590, *Chatter Singh v. Amir Singh* (Confirming in Letters Patent Appeal in A I R 1915 All 311.)
7. (1877) 2 Bom 356 (360), *Dulsook Rattanchand v. Chugon Narrun*.
(1891) 7 Cal 56 (60) . 5 Ind Jur 525, *Asmutullah Dalal v. Kally Churn Mitter*.
(1918) A I R 1918 Sind 68 (69) . 11 Sind L R 120 . 45 Ind Cas 324, *Farm of Bhawandas Feroomal v. Meghraj*.
[But see (1934) A I R 1934 Oudh 334 (336) : 149 Ind Cas 603 . 9 Luck 602, *Lal Bahadur v. Mathura Prasad*]
7. See (1925) A I R 1925 Cal 1012 (1015) . 86 Ind Cas 1051 . 54 Cal 145, *Jahm Chand v. Yusufali Choudhury*
(1903) 27 Bom 1 (10, 12, 13) . 4 Bom L R 688 (F B), *Kashiram v. Pandu*
(1920) A I R 1920 Bom 71 (73) . 44 Bom 840 . 58 Ind Cas 65, *Amrit K han derao Kango v. Govind Ramachandra*.
(1883) 5 All 289 (292, 293) . 1883 All W N 83, *Radha Prasad Singh v. Bhagwan Rai*.
(1889) 11 All 482 (485) . 1889 All W N 186, *Buddhu Lal v. Ralhhhab Das*.
(1926) A I R 1926 Cal 212 (213) . 85 Ind Cas 784, *Kalicharan Roy v. Mohesh Chandra Ghosh*
(1920) A I R 1920 Sind 25 (26) . 59 Ind Cas 607 . 14 Sind L R 123, *Bahadur Dino v. Galomal*.
(1869) 11 Suth W R 570 (571) . 2 Beng L R A O 345, *Upendra Mohan Tagore v. Takalia Bepari*.
8. (1927) A I R 1927 P O 146 (147) . 101 Ind Cas 736 . 5 Rang 422 . 54 Ind App 272 (P C).

Article 182
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In that case, a decree was passed for the payment of money in certain instalments. It was provided in the decree that on default in the payment of any instalment the decree-holder would be entitled to take possession of certain properties. It was held by the Privy Council that the default of the judgment-debtor in regard to each instalment would entitle the decree-holder to apply for possession under the decree and an application for possession within three years of the date on which any of the instalments fell due would be in time although it may be made more than three years from the date of the earliest default.

But, assuming that an application for the enforcement of the *default clause* must be made within three years from the earliest default, the question arises whether the fact that such application is barred by limitation necessarily involves the consequence that an application for the enforcement of the payment of the *instalments* that have fallen due will also be barred. In other words, suppose an application for the enforcement of certain instalments which fell due within three years of the application is made *after three years from the earliest default*. Will such an application be barred merely because an application for the enforcement of the *default clause* claiming the entire decretal amount without regard to the instalments would have been barred? On this question there is a conflict of decisions

The following three views have been expressed on the question—

1. The application for the enforcement of the payment of the instalments which fell due within three years of the application will not be barred though the application for the enforcement of the *default clause* may be barred.⁹ This view proceeds on the ground that the clause entitling the decree-holder to execute for the whole amount is only intended for the benefit of the decree-holder and therefore his failure to avail himself of that benefit cannot deprive him of his right to the payment of the *instalments under the decree*.

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9. (1928) A I R 1928 All 629 (640) : 51 All 237 : 112 Ind Cas 73 (F B), *Joti Prasad v. Srichand*.
 (1935) A I R 1935 All 259 (261) : 157 Ind Cas 1052, *Hari Ram v. Himman Lal*.
 (1934) A I R 1934 All 534 (538) : 149 Ind Cas 598 : 56 All 921, *Ram Prasad Ram v. Jadunandan Upadhyā*.
 (1879) 2 All 291 (293), *Kanchan Singh v. Sheo Prasad*.
 (1936) A I R 1936 Bom 268 (270) : 163 Ind Cas 937, *Bomatu Bhadu Ghatole v. Govardhandas Nanabhai*.
 (1936) A I R 1936 Bom 17 (19) : 60 Bom 62 : 160 Ind Cas 527, *Yeherbhas Vallabhai v. Jater Soma*. (Dissenting from A I R 1918 Bom 163.)
 (1887) 14 Cal 352 (354, 355), *Ram Culpoo Bhattacharyj v. Ram Chunder Shome*.
 (1883) 9 Cal 857 (860), *Nalmadhubi Chakerbutty v. Ram Sadoy Ghosh*.
 (1883) 13 Cal L R 243 (246), *Chunder Komal Dass v. Bissasurree Dass*.
 (1870) 14 Suth W R 414 (415) : 6 Beng L R App 31, *Krishna Chandra Shaha v. Omed Ali*.
 (1869) 12 Suth W R 71 (72). 3 Beng L R App 112, *Mt. Khedu v. Kalu Sahu*.
 (1928) 109 Ind Cas 272 (272) (Lab), *Raja v. Harari*.

2. An application for the execution of the decree made after three years from the date of the earliest default will be barred not only with reference to the *default clause* making the whole amount payable but also with reference to the *instalments*, so that even the instalments which fell due within three years of the application cannot be recovered¹⁰ This view proceeds on the ground that in such cases, on default occurring, the decree ceases to be an *instalment decree*.

3. The question whether the application for the enforcement of the payment of instalments due under a decree will be barred even with reference to the instalments which fell due within three years of the application, depends on the *terms* of the default clause.¹¹ If the clause leaves it to the *option* of the decree-holder to execute for the whole amount on default taking place, his application for the instalments will not be barred although made more than three years after the first default. But, if the clause makes it *obligatory* on the decree-holder to execute for the whole amount on default taking place, then his application for execution made more than three years from the

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- (1912) 16 Ind Cas 842 (842, 843) 1913 Pun Re No. 6, *Kishen Chand v. Bhai Gopal Singh*.
 (1902) 1902 Pun Re No. 100 . 1902 Pun LR No. 131, *Allah Bakhsh v. Bhasani*.
 (1881) 3 Mad 256 (258) . 6 Ind Jur 190, *Appayya v. Papayya*.
 (1935) A I R 1935 Oudh 465 (467) . 156 Ind Cas 764 . 11 Luck 276 (F B), *Ajodhya Prasad v. Bans Lal*.
 (1933) A I R 1933 Pesh 14 (15, 16) 141 Ind Cas 745, *Mt Koran v. Bhai Nanak Singh*.
 (1939) A I R 1939 Sind 49 (51), *Lekhraj Sirumal v. Khubchand*.
 10. (1890) 12 All 569 (571) 1890 All W N 19, *Mitthu Lal v. Khairati Lal*.
 (1885) 7 All 327 (330) 1885 All W N 26, *Zahur Khan v. Bakhtawar*.
 (1879) 2 All 443 (444) 4 Ind Jur 580, *Shub Dal v. Kalka Prasad*.
 (1923) A I R 1923 Bom 207 (208) 72 Ind Cas 275, *Hansraj Godhaji v. Bapu*.
 (1918) A I R 1918 Bom 163 (164) 42 Bom 728 47 Ind Cas 313, *Raichand Motichand Gujar v. Dhondo Lazuman Baure*.
 (1894) 1891 Bom P J 407, *Hats Deichnnd v. Naroji*.
 (1926) A I R 1926 Cal 212 (212, 213) 85 Ind Cas 784, *Kalicharan v. Mohesh Chandra*.
 (1918) A I R 1918 Cal 245 (246) 37 Ind Cas 916, *Joyanuddin Khan v. Jamrudin Sarkar*.
 (1901-02) 6 Cal W N 349 (350), *Dholanand Jha v. Padmanund Singh*.
 (1901) 31 Cal 297 (299, 300), *Jadab Chandra Bakshi v. Bhairab Chandra Chukherbutty*
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Monee

Debec.

11. (1917) A I R 1917 All 351 (352) 39 Ind Cas 634 39 All 280, *Lachmi Narain v. Sarju Parshad*.
 (1894) 16 All 371 (374) 1894 All W N 115, *Shankar Prasad v. Jalpa Prasad*.
 (1883) 5 All 201 (206) 1882 All W N 221, *Janaki Prasad v. Ghulam Ali*.
 (1919) A I R 1919 Cal 322 (323) : 49 Ind Cas 497, *Bama Sundari Dasya v. Kiran Chandra*.

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earliest default will be barred not only with regard to the *default clause* but also with reference to the *instalments*, so that even his right to recover the instalments which fell due within three years of the application will be barred.

An analysis of the decisions cited in Foot-Notes 9 to 11 above will show that the general trend of opinion of all the High Courts except those of Calcutta and Patna is in favour of the *first* view, that the general trend of decisions of the High Court of Calcutta is in favour of the *second* view and that the *third* view has been adopted by the Patna High Court and in certain decisions of other High Courts.

Where an instalment decree with a default clause making the whole amount payable on one or more defaults has been passed and the decree-holder, on a default taking place, elects to enforce the default clause by applying for execution in respect of the whole amount without regard to the instalments, his subsequent application for execution must be treated only as an application in respect of the whole decree and not as one in respect of the instalments under the decree. Hence, where such an application is made more than three years from the final order on the previous application, it will be barred even with regard to the instalments falling due under the decree within three years of the application.¹² If the application is made within three years of the final order on the prior application, it will be within time under clause 5 of this Article.

Where a decree provides for payment by instalments and contains a clause that if default is made in regard to one or more instalments the decree-holder should be entitled to the possession of certain lands, an application for the enforcement of the payment of any of the instalments will come within this clause, and the decree-holder will be entitled to recover such instalments as fell due within three years of the application although such application has been made more than three years after the *earliest* default.¹³ Even with regard to an application for possession to which the decree-holder becomes entitled on default, it has already been seen that under the Privy Council decision in *Maung Sin v. Ma Tok*,¹⁴ limitation for such application will run from each default and not from the earliest

(1886) 13 Cal 73 (75), *Judhistir Patro v. Nobin Chandra Khela*.

(1934) 6 Ind Rul Oudh 592 (594), *Lal Bahadur v. Mathura Prasad*.

(1932) A I R 1932 Pat 253 (255) : 11 Pat 440 : 139 Ind Cas 203, *Braham Kishun Narain Deo v. Harishar Munder*.

(1918) A I R 1918 Pat 95 (97) : 48 Ind Cas 728 : 4 Pat L Jour 865, *Manindra Nath Roy v. Kanhai Ram Marwari*.

12. (1907) 1 Sind L R 252 (254), *Jethanand Topandas v. Lalamal Sitlmal*.

(1931) A I R 1931 Bom 263 (263, 264) : 132 Ind Cas 437, *Pandurang v. Mahadev*.

(1905) 23 All 249 (251) : 2 All L Jour 828 : 1905 All W N 263, *Bhagwan Das v. Janaki*.

13. (1927) A I R 1927 P C 146 (147) : 101 Ind Cas 736 : 51 Ind App 272 : 5 Rang 422 (P C), *Maung Sin v. Ma Tok*.

14. (1927) A I R 1927 P C 146 (147) : 101 Ind Cas 736 : 51 Ind App 272 : 5 Rang 422 (P C).

default. The undermentioned decisions,¹⁵ which have taken a contrary view, must be held to be not good law.

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EXPLANATION I.

137. Decree in favour of several persons. — A decree in favour of several persons may be passed either jointly or severally, distinguishing portions of the subject-matter as deliverable or payable to each. In the former case, an application for execution by any one of the decree-holders will save limitation for execution, in favour of all the joint decree-holders. In the latter case, an application for execution by one of the decree-holders will save limitation only in favour of the applicant and not in favour of any other decree-holder.

In the case of a joint decree, an application for execution by a *representative* of one of the joint decree-holders will also save limitation in favour of all the decree-holders¹

There is a conflict of decisions as to whether a joint decree-holder can apply for execution in respect of what he conceives to be his own share of the decree² But, if it is held that such an application is in accordance with law, it will save limitation not only in favour of the particular decree-holder who applies for execution but also in favour of the other decree-holders³

A decree under which the plaintiff is entitled to recover a certain sum from the defendant and the latter is entitled to obtain possession from the plaintiff, is a decree passed severally in favour of more persons than one and an application for execution by the plaintiff or the defendant will not save limitation for execution by the other.⁴

There was no provision corresponding to Explanation I in the Limitation Act of 1859. It was nevertheless held in decisions passed under that Act that an application for execution of a joint decree made by one of the decree-holders would save limitation in favour of all.⁵

15. (1881) 4 All 83 (85). 1881 All W N 124, *Ugrah Nath v. Lagan Mani*.

(1916) A I R 1916 Lah 66 (68) 36 Ind Cas 978 1917 Pun Re No. 8, *Mt. Kirpa Devi v. Dasaundhi Ram*.

Note 137

1. (1899) 22 All 199 (204) 1900 All W N 8 (F B), *Zamir Hasan v. Sundar*.

(1910) 7 Ind Cas 939 (940) 34 Bom 672, *Mulchand v. Kesarji Khupchand*.

2. See the Authors' Civil Procedure Code, Order 21 Rule 15 Note 11.

3. (1928) A I R 1928 Cal 861 (862) 118 Ind Cas 337, *Kanak Prota Devi v. Dharendra Nath*

[See also (1871) 16 Suth W R 29 (30), *Shib Chunder Doss v. Ram Chunder Poddar*]

[But see (1934) A I R 1934 Pesh 40 (42) 152 Ind Cas 443, *Ahmad Ali v. Mt. Fatima Sultan*]

4 (1897) 22 Bom 993 (1001), *Jeddi Subraya v. Ramrao Ram Chandra*

5. (1869) 11 Suth W R 421 (431), *Mt. Dhunessuree v. Goodhur Sahoy*

(1869) 11 Suth W R 343 (344) 2 Beng L R App 47, *Azizunnissa Khatun v. Shashibhusan Bose*

(1867) 8 Suth W R 100 (101), *Roy Preonath Chowdhry v. Prannath Roy Chowdhry*

138. Decree against several persons.— A decree may be passed against several persons, either jointly or severally, distinguishing portions of the subject-matter as deliverable or payable by each. In the former case, an application for execution against one of the judgment-debtors will save limitation as against all of them.¹ In the latter case, an application for execution will save limitation only as against the particular judgment-debtor against whom it has been made and not against others.²

Where a decree is passed jointly against *A* and *B*, the fact that it is provided in the decree that it should be first executed against

- (1866) 6 Suth W R Misc 59 (59), *Johroonissa Khatoon v. Ameeroonissa Khatoon*.
 (1866) 6 Suth W R Misc 76 (77), *Maharanee Indurjeet Kunwur v. Marum Ali Khan*.
 (1864) 1 Suth W R Misc 1 (2), *Brojo Coomar Mullick v. Ram Bulsh Chateerjee*.
 (1870) 13 Suth W R 128 (128) : 4 Beng L R App 41, *Aodh Behari Lal v. Brohmohun Lal*.
 6. (1870) 13 Suth W R 244 (245), *Chand Sahib v. The ...* (Doorga for a

(1889) 13 Mad 236 (239), *Seshan v. Rajagopala*. (A decree in a partition suit, in favour of two Hindu minor brothers and another brother acting as their next friend which declares the rights of the three brothers to redeem a certain property is not a decree passed severally in favour of the plaintiffs.)

1. (1909) 2 Ind Cas 88 (88) (All), *Lachminakur v. Sampat Rai*.
(1907) 29 All 623 (626): 1907 All W N 204: 4 All L Jour 552, *Gauri Sahai v. Ashfaq Hussain*. (Decree for sale against all defendants—Decree against one set aside—Suit against that defendant subsequently decreed—Second order absolute—The two orders operate as one decree—Decree made absolute.)
(1926) A I R 1926 Cal 86 (67) . 88 Ind Cas 1039, *Tara Prasanna v. Jnanendra Narayan*.
(1909) 4 Ind Cas 403 (409) (Cal), *Barada Kinkar v. Nabin Chandra*.
(1931) A I R 1931 Lah 116 (117) : 134 Ind Cas 194, *Gopi Chand v. Meher Chand*.
(1916) A I R 1916 Mad 1 (2) : 80 Ind Cas 423 . 38 Mad 419, *Abdul Khadir v. Ahammad Shawwa Ravuther*.
(1910) 5 Ind Cas 800 (800) . 13 Oudh Cas 48, *Kabilasi Kunwar v. Rudra Pratap Sahi*.
(1927) A I R 1927 Pat 416 (417) : 103 Ind Cas 867, *Ramasray Chaudhari v. Lachhmi Narayan Ojha*. (Decree joint and several—Application against one judgment-debtor is step against all.)
[See also (1866) 6 Suth W R Misc 25 (25), *Shahkh Buneed Ali v. Juggesser Singh*. (Cases under Section 20 of Act XIV of 1859)]
2. (1918) A I R 1918 All 330 (330) : 46 Ind Cas 669 : 40 All 206, *Ghulam Muhiuddin Khan v. Dambar Singh*.
(1926) A I R 1926 Cal 267 (270) : 85 Ind Cas 657, *Direndra Chandra v. Tulsi Charan*. (Simply mentioning the name of the other judgment-debtor will not make it one against both)
(1935) A I R 1935 Lah 919 (950) : 162 Ind Cas 208, *Umrao Singh v. Hafiz Muhammad Abdullah*.
(1934) A I R 1934 Lah 637 (639) : 153 Ind Cas 238, *Hafiz Mahomed Abdullah v. Umrao Singh*.

A does not make it other than a joint decree against them both.³ Similarly, the fact that a joint decree differentiates between the several judgment-debtors as regards the *mode of execution* does not affect its character as a joint decree.⁴ So also, the fact that subsequent to the passing of a joint decree against several persons the liability of one of them is limited by an adjustment with the decree-holder, does not alter the character of the decree as a joint decree.⁵ An application for execution against one of several joint judgment-debtors under a decree will save limitation for execution against the other judgment-debtors, although, as against the former the decree is subsequently set aside or declared inoperative.⁶

A decree passed against several persons as the legal representatives of a deceased person is passed against them *jointly* and severally and an application for execution made against one of the judgment-debtors will save limitation for execution against the others also.⁷

A decree against the manager of a Hindu joint family carrying on business is a decree passed against several persons *jointly* within the meaning of Explanation I and an application for execution against any of the members of the family will save limitation for execution against other members also.⁸

In a suit for sale on a mortgage, it was found that one of the properties had been previously sold for arrears of revenue. Hence, a decree was passed for the realization of the total amount due by the sale of the other properties and out of a certain amount of cash in the hands of one of the defendants which had been received by him as the surplus proceeds of the revenue sale. It was held that the decree was one passed jointly against all the defendants and that an application for execution by sale of the properties would save limitation for execution against the surplus sale proceeds of the revenue sale.⁹

Where a mortgage decree does not apportion the mortgage debt as among the different items of property mortgaged, it is a joint

(1935) A I R 1935 Oudh 9 (11) 152 Ind Cas 457. 10 Luck 260, *Sahas Lal v Deputy Commissioner, Sitapur*.

[See also (1873) 19 Suth W R 30 (32) 10 Beng L R 258 (F B), *Wise v. Rajnarain Chuckerbutty* (Case before enactment of Explanation I)]

(1868) 10 Suth W R 10 (11) 10 Beng L R 259 (Note), *Khemadibia v. Kumala Kanti Dukshie* (Do)]

3 (1937) A I R 1937 Lah 792 (793), *Murlimall & Sons v. Bhawan Dass*.

4. (1929) A I R 1929 All 795 (796) 118 Ind Cas 237, *Moti Lal v. Champa Lal*.

5 (1921) A I R 1921 Sind 132 (134) 79 Ind Cas 477 16 Sind L R 245, *Donald Graham & Co. v. Kewalram*

6 (1909) 1 Ind Cas 339 (340) 31 All 309, *Lalta Prasad v. Suraj Kunwar*

7. (1934) A I R 1934 Rang 101 (102) 149 Ind Cas 98, *U Nyo v. U Po Hlaing*.

8 (1922) 67 Ind Cas 56 (57) (Lah), *Kidar Nath v. Radha Kishan*.

9. (1924) A I R 1924 Pat 700 (702, 703) 76 Ind Cas 452, *Bishun Chand v. Abhoykumar Chand*.

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decree passed against the mortgagor and a subsequent mortgagee of some of the items.¹⁰

An application for execution against one joint judgment-debtor will save limitation not only against the other judgment-debtors but also against the legal representatives of the other judgment-debtors.¹¹

But an application for execution against a joint judgment-debtor will save limitation for execution against other joint judgment-debtors only where such application has been one in accordance with law and made to the proper Court.¹²

It is an application for execution or to take a step-in-aid of execution against a joint judgment-debtor that will save limitation against the other judgment-debtors. The mere fact that as against one joint judgment-debtor limitation is *suspended* in consequence of his adjudication as an insolvent, limitation will not be suspended in respect of the other joint judgment-debtors also.¹³

Explanation I only provides that an application for execution or to take a step-in-aid of execution against one joint judgment-debtor will save limitation for execution against the other joint judgment-debtors. The Explanation has nothing to do with the question whether an order of revivor of a decree of the Original Side of a High Court passed against one joint judgment-debtor will be operative against other joint judgment-debtors also.¹⁴

139. Judgment-debtor and his surety—Whether application for execution against one will save limitation against the other.—Where a person, either before or after a decree is passed, stands surety for the satisfaction of the decree by the judgment-debtor and the decree is executable against the surety also under the provisions of Section 145 of the Civil Procedure Code, an application for execution against him will be governed by this Article.¹⁵ The question, however, arises whether an application for execution either against the surety or the judgment-debtor alone will save limitation

10. (1903) 80 Cal 761 (769) 8 Cal W N 251, *Troylokya Nath Bose v. Jyoti Prakash Nandi*.

11. (1927) A I R 1927 Mad 1103 (1104): 106 Ind Cas 391, *Kotigadu v. Subbayya*.
 (1905) 2 Cal L Jour 544 (545), *Jogendra Nath Roy v. Rank Chandra Banerjee*.

12. (1899) 27 Cal 210 (213), *Harendra Lal Roy v. Sham Lal Sen*.

13. (1938) A I R 1938 Pat 395 (396): 176 Ind Cas 876, *Ram Ran Bhoj Prasad v. Nageshwar Tewary*.

14. (1918) A I R 1918 Mad 518 (514): 40 Mad 1127: 40 Ind Cas 603, *Krishnaia v. Gajendra*.

Note 139

1a. See also Note 13 to Section 145 of the Authors' Commentary on the Code of Civil Procedure.

(1937) A I R 1937 Cal 452 (454): 173 Ind Cas 183, *Harendra Kumar v. Gurupada Bhowmick*.

(1933) A I R 1933 Mad 219 (220): 142 Ind Cas 363, *Rami Reddi v. Gurusurthy*.

(1932) A I R 1932 P C 181 (183): 136 Ind Cas 629 (P C), *Raghunandan Prasad Singh v. Kalyanand Singh Bahadur*.

(1935) A I R 1935 Lah 590 (592), *Nanu Mal v. Amar Nath*.

against *both* of them. On this question there is a conflict of decisions. One view is that such application will save limitation only against the judgment-debtor or the surety, as the case may be, and not against *both* of them.¹ The view is based on the ground that in such cases the judgment-debtor and the surety are not persons against whom the decree has been passed jointly within the meaning of the latter part of the 2nd paragraph of Explanation I. The other view is that in such cases the application for execution will save limitation against *both* the judgment-debtor and his surety.² According to the decisions which take this view, Explanation I does not apply at all to such cases. Hence, as an application for execution against either the judgment-debtor or the surety alone will be one quite in accordance with law under clause 5, such application will save limitation against both. It is submitted that the latter set of decisions is correct.

Where a decree has been passed jointly against a judgment-debtor and his surety, the case will clearly come within the latter part of the 2nd paragraph of Explanation I and an application for execution against either of them will save limitation against both. In such cases, the mere fact that the decree provides that it should be executed against the surety if the amount was not realized from the principal debtor, does not make the decree other than a joint decree for the purpose of the Explanation.³

1. (1906) 31 Bom 50 (54) : 8 Bom L R 807, *Narayana v. Timmaya*.
(1926) A I R 1926 Cal 267 (269) . 85 Ind Cas 657, *Birendra Chandra Singha v. Tulsi Charan*.
(1922) A I R 1922 Lah 203 (209) 60 Ind Cas 265, *Wazir Baksh v. Har Ram*.
(1914) 1914 Mad W N 64 (64) (Jour), C. M S A. No. 62 of 1913.
(1929) A I R 1929 Pat 597 (601) 120 Ind Cas 315, *Kiryanand v. Parthachand*.
(1929) A I R 1929 Pat 595 (597) 120 Ind Cas 309 8 Pat 310, *Raghunandan Prasad v. Kiryanand*.
(1928) A I R 1928 Rang 282 (283) 111 Ind Cas 479 . 6 Rang 334, *Mohamed Kasim v. Janila Beebee*.
(1923) A I R 1923 Bom 366 (367, 368) 73 Ind Cas 233 47 Bom 778, *Usuf Ali v. Syed Amin*.
[See also (1898) 23 Bom 478 (483), *Kusaji v. Vinayak R. Parbhu*.
and so, application for execution against him does not save limitation against the principal debtor]
2. (1935) A I R 1935 Mad 189 (189) 58 Mad 276 : 155 Ind Cas 664, *Gangaraju v. Subbayya*.
(1921) A I R 1921 All 291 (293) 43 All 152 58 Ind Cas 794, *Md. Hafis v. Md. Ibrahim*.
(1922) A I R 1922 All 481 (483) 44 All 743 77 Ind Cas 129, *Badrud din v. Md. Hafis*.
(1937) A I R 1937 Oudh 351 (353) 168 Ind Cas 600 13 Luck 353, *Bachchu Singh v. Radhe Lal*.
3. (1922) A I R 1922 Lah 457 (458) 67 Ind Cas 301, *Honda Ram v. Firm Seth Kanwar Bhansukhand*

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Steps taken for the enforcement of a surety bond against a surety for a judgment-debtor *otherwise than by the execution of the decree* against the surety under Section 145 of the Civil Procedure Code, will not save limitation for execution of the decree against the judgment-debtor.⁴ The reason is that in such cases the steps taken for the enforcement of the surety bond will not come within the description of an application for execution or to take a step-in-aid of execution of the decree.

See also the undermentioned cases.⁵

140. Decree for partition.—With regard to decrees for partition passed before the coming into force of the Civil Procedure Code of 1908, which merely declared the respective rights of the parties leaving it to be determined in execution what properties were to be allotted to each, it has been held that such decrees were *joint* decrees for the purpose of the Explanation and that an application for execution by any one of the parties will save limitation in favour of all.¹ The basis of these decisions is that such decrees contained a *joint declaration* of the rights of the parties. But this principle will not apply to a final decree for partition passed after the coming into force of the Civil Procedure Code of 1908, specifying the particular properties to be allotted to the different parties. Such a decree will clearly be a decree passed *severally* in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each. Hence, in such a case an application for execution made by one of the parties to the decree will not save limitation in favour of any other party.² But where a decree, while awarding to

(1920) A I R 1920 Upp Bur 21 (23) : 3 Upp Bur Rul 261 : 60 Ind Cas 23, *Yinle Supaya v. Maung Kyin*.

4. (1933) A I R 1933 Mad 722 (724) : 145 Ind Cas 1004, *Jamunadas Raruji Sast v. Krishnan*.

5. (1933) A I R 1933 Oudh 209 (213) : 8 Luck 427 : 143 Ind Cas 808, *Shyam Lal v. Nasiruddin Beg.* (Article 182 does not apply at all to an application for execution of the decree guaranteeing payment of 1000 Rs. when the decree was for 1000 Rs. and the last application.)

(1866) 6 Suth W R Misc 44 (44), *Hurkhoo Singh v. Baboo Ram Kishen.* (Decision under Act of 1859—Execution against principal debtor will not keep alive decree against surety.)

Note 140

1 (1878) 3 Cal 551 (552) : 2 Cal L R 187, *Sheskh Khorshed Hossein v. Nubbee Fatima*.

(1882) 9 Cal 568 (570), *Mohun Chunder Kurmohar v. Mohesh Chunder Kurmohar*.

(1896) 1896 Bom F J 271, *Gocerandas v. Ghanashandas*.

(1886) 1886 Bom F J 287, *Narayan v. Vithal*.

(1922) A I R 1922 Mad 327 (328) : 65 Ind Cas 990, *Ramagami Iyengar v. Narayana Iyengar*.

... ..

the different sharers their respective shares, declares certain property to be joint, it has been held that such a decree is *joint* and that an application for execution by one of the parties will save limitation in favour of all.³ The reason given is that a decree cannot be joint and several at the same time.

Where a decree consisted of two parts, one in favour of the plaintiffs against the defendant, entitling them to have their share in the property in the suit to be set apart, and the other, enabling them to have a partition *inter se* of such joint share on the younger of them coming of age, it was held that a joint application for the execution of the former part will not afford a fresh starting point for the period of limitation in respect to an application by one of the plaintiffs in execution of the latter part of the decree.⁴

141. Decree partly joint and partly several against several defendants.—A decree passed against several persons may be partly joint and partly several. Thus, it may be passed jointly against all the persons in regard to a certain matter, while in regard to some other matter the decree may be passed severally against them, distinguishing portions of the subject-matter as payable or deliverable by each. For instance, a decree may be passed against several persons, jointly for possession and severally for costs, specifying the amount of costs to be paid by each. Is such a decree a joint decree or a several decree for the purpose of the second paragraph of Explanation I? On this question, there is a conflict of decisions. The following two views have been expressed on the question—

1. Such a decree is a joint decree. According to this view, a decree is joint if any one of the reliefs granted under the decree is granted against the defendants jointly, even though some other relief may be given against each of the defendants separately.¹
2. In such cases, the decree must be treated as a joint decree in regard to the reliefs granted jointly against the defendants and as a decree passed severally against them in regard to the reliefs granted against each of them separately. Under this view, if the previous application related to a relief granted against a

(1932) A I R 1932 Cal 869 (870) 139 Ind Cas 786, *Mon Mohan Gope v. Madhusudan Gope*.

3. (1932) A I R 1932 Cal 869 (870) 139 Ind Cas 786, *Mon Mohan Gope v. Madhusudan Gope*.

(1933) A I R 1933 Mad 789 (791) : 145 Ind Cas 968, *Mahomed Sahood Leras Sayabu v. Mayamad Ammal*

4. (1887) 1887 Bom P J 72, *Yashwantrao v. Krishnabai*.

Note 141

1. (1906) 30 Mad 268 (269) 2 Mad L Tim 183, *Subramania Chettiar v.*

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defendant separately, it would not save limitation in regard to any other defendant. But, if such application related to a relief granted jointly against the defendants, the application will save limitation for execution in regard to such relief, not only against the particular defendant against whom the application was made but also against the other defendants.²

Where a relief has been granted by a decree against several persons jointly and another relief has been granted by the same decree against one of them separately, a previous application against *all* the judgment-debtors for execution in respect of the joint relief will save limitation in respect of an application for the enforcement of the separate relief against the *particular* defendant against whom it has been granted.³

142. Several persons becoming entitled to or liable under decree after it is passed — Effect of application by or against one. — Explanation I only contemplates cases in which the decree, when it is passed, is passed in favour of or against more persons than one.¹ Hence, where at the time when a decree is passed there is only one decree-holder or judgment-debtor but, subsequently, more than one person become entitled to the decree or become liable under the decree, the Explanation does not apply. But, in such cases, under the terms of clause 5 itself, an application for execution or to take a step-in-aid of execution made by any of the persons entitled to the decree or against any of the persons liable under the decree, will save limitation with regard to *all* of them, provided the application is in accordance with law and is made to the proper Court.

Illustrations

1. A sole decree-holder dies. An application for execution made by one of his legal representatives will save limitation for the benefit of all the legal representatives.²
2. A sole decree-holder transfers a part of his decree to another. An application for execution by the transferee will save limitation for an application by his transferor also.³

(1937) A I R 1937 Mad 335 (391) : I L R (1937) Mad 616 : 163 Ind Cas 351 (F B), *Chandambara Nadar v. Rama Nadar*.

2. (1926) A I R 1926 All 440 (444) : 48 All 377 : 94 Ind Cas 961, *Sahu Nand Lal Saran v. Sahu Dharan Kirti Saran*.

[See also (1876) 25 South W R 310 (311), *Chowdhry Hurrekhar Singh v. Baboo Hriday Narain*.]

3. (1922) A I R 1922 All 353 (359) : 44 All 166 : 65 Ind Cas 353, *Ram Briksh Rai v. Deo Tewari*.

(1937) A I R 1937 Cal 547 (549) : 174 Ind Cas 184, *Charn Chandra Ray v. Hrushikesh Ray*.

Note 142

1. (1937) A I R 1937 Oudh 351 (353) : 163 Ind Cas 600 : 13 Luck 333, *Puckish Singh v. Rishi Lal*.

2. (1916) A I R 1916 Mad 919 (919) : 81 Ind Cas 853, *Mahs Patro v. Narayana Panigrahi*.

(1925) A I R 1925 Oudh 30 (32) : 105 Ind Cas 611 : 3 Luck 126, *Md. Sajid Ali v. Sajjad Mirza*.

3. (1930) 14 Mad 252 (254) : 1 Mad L Jour 210, *Ramaswami v. Andu Pillai*.

3. A decree-holder assigns different parts of the decree to different persons. An application for execution made by any of the assignees will save limitation for the benefit of all.⁴
4. A sole judgment-debtor dies. An application made against one of his legal representatives will save limitation against all of them.⁵

It will be noticed that in illustrations 2 and 3 above the decree vests in severalty in different persons. Still, an application for execution by one of them saves limitation for the benefit of all.

EXPLANATION II.

142a. Explanation II. — See Notes 87 to 98, *ante*.

MISCELLANEOUS.

143. Revival of application. — An execution application must be deemed to be pending so long as no final order disposing of it judicially has been passed thereon. A subsequent application in such a case for execution will be deemed to be one merely for the continuation of the original proceeding.¹ On the other hand, where a final judicial order terminating the proceeding has been passed on the application, it cannot be revived, and a subsequent application for execution will be regarded as a fresh application and not as one for a revival or continuation of the original proceeding.²

4. (1922) A I R 1922 Mad 129 (130) : 69 Ind Cas 277 : 45 Mad 85, *Venkata Reddayya v. Yaralakayya*.
 (1921) A I R 1921 Mad 415 (417), *Venkata Reddayya v. Yaralakayya*.
 5. (1881) 3 All 517 (519) . 1881 All W N 16, *Ram Anuj Sewak v. Hingu Lal*.
 (1887) 12 Bom 48 (50), *Krishnaji Janardhan v. Marrarav*.
 (1912) 13 Ind Cas 313 (313) (Mad), *Adusupalli Venkata Rao v. Marikurthu*.

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1. (1933) A I R 1933 Mad 418 (421) 143 Ind Cas 1 56 Mad 490 (FD), *Tripura Sundaramma v. Abdul Khader*.
 (1915) A I R 1915 Mad 407 (411) : 26 Ind Cas 244, *Venkatamma v. Manikkam Nayan Varu*.
 (1928) A I R 1928 Mad 971 (971) : 109 Ind Cas 375, *Mallikaraja Pudu v. Nalla Venkaya*.
 (1926) A I R 1926 All 510 (511) : 94 Ind Cas 869, *Mt. Butte v. Kanhaiyalal* {Application for execution ordered to be simply "filed"—Fresh application is to treated as one for revival}.
 (1906) 16 Mad L Jour 503 (504, 505) 1 Mad L Tim 291, *Talapoori Appiah v. Maram Reddi Ram Reddi*.
 (1926) 94 Ind Cas 80 (81) (Cal), *Akshoy Kumar v. Nalini Kumar*. (No fresh execution application is necessary to revive the first application which is pending before the Court and where there has been no dismissal of the original application for execution).
 (1891) 1894 Pun Re No. 27, *Kundan Lal v. Mt. Mahkhan*.
 (1934) A I R 1934 All 481 (486) 56 All 791 . 148 Ind Cas 1017 (F B), *Shiva Shankar Das v. Mufti Syed Yusuf Hasan*.
 2. (1933) A I R 1933 Mad 418 (421) 143 Ind Cas 1. 56 Mad 490 (FB), *Tripura Sundaramma v. Abdul Khader*.
 (1937) A I R 1937 All 513 (514) 170 Ind Cas 507, *Ziladar Singh v. Brijlal Singh*.
 (1879) 4 Cal 877 (881) : 3 Cal L R 161 4 Ind Jur 236, *Hurrenath Bhunjyo v. Chumilal Ghose*

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Note 143

The question whether or not an execution proceeding has been finally disposed of so as to be incapable of being revived or continued, is a question of fact which has to be determined having regard to the facts and circumstances of the particular case. The form of the order passed on the application is not sufficient to determine the question. The question is really one of substance and not of form.³

Where an execution proceeding is *suspended by no act or default on the part of the decree-holder*, the latter has a right to ask the Court to revive and carry through the execution proceeding.⁴ The leading case on the point is *Qamaruddin Ahmed v. Jawahir Lal*.⁵ In that case an order was made on an execution application dated 24th of August 1888, to the effect that the property to be sold in execution being ancestral, the case should be struck off the file and the papers transferred to the Court of the Collector for the completion of the sale proceedings. A further order was later on passed to the effect that as a fee of Re. 1 had not been paid by the decree-holder on account of the order for sale by auction, the case should not be transferred to the Collector. More than three years after the date of the original application the decree-holder applied for the revival of the application. Their Lordships of the Privy Council observed as follows :

"Their Lordships are of opinion that the execution proceedings commenced by the petition of the 24th August 1888 were never finally disposed of and that the application now under consideration was in substance as well as in form, to revive and carry through a pending execution suspended by no act or default of the decree-holder and not an application to initiate a new one"

Where an order purporting to dispose of an execution proceeding finally is made *behind the back of the decree-holder* without giving

- (1908) 5 All L Jour 622 (625) : 1908 All W N 253, *Safia Begam v. Shyam Prasad*.
 (1912) 13 Ind Cas 160 (160) (Mad), *Parry & Co. v. Vadnelu Pillai*. (Petition dismissed though attachment continued.)
 (1911) 11 Ind Cas 48 (50) (Cal), *Kedar Nath v. Prodyot Kumar (Do.)*
 [See also (1891) 1881 All W N 47 (47), *Bhola Dat v. Tuls Singh*]
 3. (1916) A I R 1916 All 24 (26) : 32 Ind Cas 1005, *Sant Lal v. Sri Nevas Das*.
 (1905) 7 Bom L R 819 (820, 821), *Mahomed Isoof Sahib v. Bachelappa Takeppa*.
 4. (1921) A I R 1921 All 99 (100) : 61 Ind Cas 417 : 43 All 383, *Madho Prasad v. Darupadi Bibi*.
 (1905) 27 All 334 (338) : 82 Ind App 102 : 1 Cal L Jour 381 : 2 All L Jour 397 : 15 Mad L Jour 253 : 7 Bom L R 433 : 9 Cal W N 601 : 8 Sar 810 (P C), *Qamar-ud-din Ahmad v. Jawahir Lal*.
 (1921) A I R 1921 Cal 472 (473) : 68 Ind Cas 207, *Ajodhya Nath v. Srinath Chandra*.
 (1923) A I R 1923 All 600 (601) : 77 Ind Cas 871, *Mahomed Hadi v. Debi Prasad*.
 [See also (1923) A I R 1923 All 471 (472) : 71 Ind Cas 963, *Amjad Ali Khan v. Md. Usman*.]
 5. (1905) 27 All 334 (338) : 82 Ind App 102 : 1 Cal L Jour 381 : 2 All L Jour 397 : 15 Mad L Jour 258 : 7 Bom L R 433 : 9 Cal W N 601 : 8 Sar 810 (P C).

him an opportunity of being heard, it cannot be regarded as a judicial determination of the proceeding on the merits, and, consequently, the proceeding will be regarded as *pending*. A subsequent application will lie for the revival and continuation of the proceeding so disposed of.⁶

Where an order is made purporting to dispose of a matter against the decree-holder at the request of the decree-holder or on the ground of the *default of the decree-holder* in carrying on the proceedings, the proceeding cannot be revived.⁷ But, where such an order is made in a case in which the *decree-holder could not take further proceeding owing to circumstances beyond his control*, the order will be regarded as merely suspensory in its nature and a fresh application will be regarded as one for the revival and continuation of the original proceeding. Thus, where the execution is *stayed* or is prevented by *injunction*, or becomes impossible to be proceeded with, owing to a claim being advanced to the property which is the subject of the execution, or owing to some other obstacle placed by the judgment-debtor in the way of execution, and the application is "dismissed" or "struck off" or "consigned to the record room," the order will not be regarded as having finally disposed of the petition, and a subsequent application will be regarded as one for the revival and continuation of the original proceeding.⁸ On the same principle,

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G. (1927) A I R 1927 All 16 (17) 100 Ind Cas 692 : 49 All 276 (F B), *Chattar Singh v. Kamal Singh*.

(1927) A I R 1927 All 165 (167) . 49 All 509 . 104 Ind Cas 116 (F B), *Baij Nath v. Ram Bharos*.

7. (1913) 20 Ind Cas 563 (564) (Lah), *Phusa v Surjan*

(1924) A I R 1924 Cal 419 (420) 74 Ind Cas 279, *Rajani Bandhu v Kali-prasanna*.

(1918) A I R 1918 Cal 332 (332) 45 Ind Cas 712, *Midnapore Zamindari Co Ltd. v Dina Nath Sahu*

(1898) 5 Cal W N 347 (348), *Dhukiram Srimani v Jyendra Chunder Sen*.

(1915) A I R 1915 All 231 (232) 28 Ind Cas 381, *Ibrahimji v. Hasanuddin Khan*.

(1898) 21 Mad 257 (260) 8 Mad L Jour 25, *Suryanarayana Pandarathar v. Gurunada Pillai*.

8. (1918) 20 Ind Cas 439 (441) (Cal), *Lal Govindnath v. Bhikar Sahu* (Order must be regarded as suspensory though in form final)

(1904) 29 Mad 50 (53) 14 Mad L Jour 401 (F B), *Suppa Reddai v. Anudai Anmal* (Claim.)

(1937) A I R 1937 All 513 (514) 170 Ind Cas 807, *Ziladar Singh v. Brij Lal*.

(1932) A I R 1932 Cal 19 (20) 53 Cal 1113 184 Ind Cas 939, *Radha Ballav Khan v Peary Lal Ghosh* (Stay)

(1891) 21 Cal 387 (391), *Balkanta Nath Mitta v. Aghore Bose*. (Do.)

(1875) 23 Sath W R 183 (184), *Booboo Pyaroo Tukobildarnee v Syud Nazir Hossein*. (Claim)

(1934) A I R 1934 All 294 (296) 148 Ind Cas 525, *Mt Nabban v. Mt. Mota*. (Injunction.)

(1880) 5 Bom 29 (34), *Kalyanbhai Dipchand v Ghanasham Lal*. (Do.)

(1906) 83 Cil 689 (692), *Guru Deo Narayan Sinha v Amrit Narayan Sinha*. (Do)

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where the Court purports to dispose of a matter against the decree-holder for no act or default of his, the order cannot be considered to have finally disposed of the application.⁹

- (1924) A I R 1924 Mad 178 (179) : 76 Ind Cas 126, *Aisamma Ayyasamma v. P. K. Abdulla*.
 (1898) 21 Mad 262 (263) : 8 Mad L Jour 18, *Sasivarna Tetar v. Arulnandam Pillai*. (Stay.)
 (1896) 23 Cal 437 (440), *Rudra Naram Guria v. Pachu Marthy*. (Claim)
 (1912) 16 Ind Cas 484 (484) (Mad), *Krishna Doss v. Mahommed Mian Rowthen*. (Do)
 (1924) A I R 1924 Mad 210 (211) : 47 Mad 176 : 79 Ind Cas 779, *Surayya v. Venkataratnam*. (Do.)
 (1921) 61 Ind Cas 817 (818) (Lah), *Shib Das v. Ram Nath*. (Do)
 (1877) 1 All 355 (357) (F B), *Paras Ram v. Gardner*. (Do.)
 (1868-69) 4 Mad H C R 261 (262, 263), *Ragava Pishardi v. Valia Thambakale*. (Do)
 (1924) A I R 1924 Cal 419 (420) : 74 Ind Cas 279, *Rajani Bandhu Chatterjee v. Kali Prasanna Chatterjee*.
 (1903) 26 All 156 (159) : 1903 All W N 221, *Ruddar Singh v. Dhanpal Singh*.
 (1903) 26 All 140 (143) : 1903 All W N 211, *Beni Prasad v. Sarju Prasad*
 (1936) A I R 1936 Cal 239 (241) : 63 Cal 57 : 162 Ind Cas 654, *Krislo Kamini Devi v. Girish Chandra Mondal*.
 (1887) 14 Cal 385 (387), *Chandra Prodhan v. Gopi Mohun Shaha*.
 (1886) 8 All 545 (548) : 1886 All W N 178, *Nandram v. Sitaram*.
 (1900) 23 All 13 (20) : 1900 All W N 178, *Thakur Prasad v. Abdul Husain*.
 (1910) 6 Ind Cas 537 (539) : 37 Cal 796, *Madhabmoni Das v. Pamela Lambert*.
 (1924) A I R 1924 Pat 576 (578) : 3 Pat 596 : 78 Ind Cas 766, *Bhagwanta Koer v. Zamir Ahmad Khan*.
 (1922) A I R 1922 All 433 (433) : 65 Ind Cas 78, *Ramlakhan Singh v. Lala Mewa Lal*. (Execution proceedings consigned to record room without any default on part of decree-holder and without decision—Further application is really one in continuance of the prior one)
 (1919) A I R 1919 Cal 1054 (1055) : 47 Ind Cas 911, *Mohini Mohan Sirkar v. Naradwip Chandra Biswas*.
 (1920) A I R 1920 All 174 (175) : 42 All 564 : 56 Ind Cas 1006, *Dalwant Singh v. Budh Singh*. (Execution restrained by injunction.)
 (1923) A I R 1923 All 600 (601) : 77 Ind Cas 871, *Mahammad Hadi v. Debi Prasad*.
 (1895) 17 All 425 (427, 428) : 1895 All W N 82, *Lakshmi Chand v. Ballam Das* (Stayed by injunction.)
 (1926) A I R 1926 All 331 (331, 332) : 91 Ind Cas 618, *Giridharilal v. Ram Charan Lal*.
 (1909) 2 Ind Cas 76 (77) : 1909 Pun Re No. 45, *Mulchand v. Muhammad*. (Blocked by claim proceedings.)
 (1902) 30 Cal 407 (411), *Ashrafuddin Ahmed v. Bepin Behari Mullick*. (Attachment released owing to insolvency of judgment-debtor.)
 (1912) 13 Ind Cas 140 (141) (Cal), *Rameswar Singh v. Terpit Singh*.
 (1935) A I R 1935 Mad 603 (603) : 58 Mad 893 : 159 Ind Cas 279 (F B), *Abdul Aziz Sahib v. Chokkan Chettiar*. (Order "possession obstructed, petition dismissed")
 [But see (1917) A I R 1917 Mad 447 (448) : 35 Ind Cas 591, *Yellampalle Venkatappa v. Matam Nanjappa*. (Dismissal of first application for non-payment of debts—Subsequent suit operating as obstacle—Second application after removal of obstacle is not one for continuation)]
 2. (1915) A I R 1915 All 410 (411) : 30 Ind Cas 677 : 37 All 518, *Yakub Ali v. Durga Prasad*.

An order striking off a proceeding is not sanctioned by any rule of law.¹⁰ But, nevertheless, Courts very often do pass such orders and the question arises as to the effect of such orders. A "striking off" of a proceeding may, under certain circumstances, amount to a final disposal of the proceeding, in which case the proceeding so disposed of cannot be revived.¹¹ On the other hand, a proceeding may be struck off which has not the effect of finally disposing of the proceeding. The question depends upon the intention of the Court in making the order and the construction of the order itself.¹² In *Puddomonee Dossee v. Roy Muthooranath*,^{12a} their Lordships of the Privy Council observed that "the striking an execution proceeding off the file in India may admit of different interpretations according to circumstances." When a very long time had elapsed between the original execution and the date on which it was struck off, their Lordships held that it should be presumed that the execution was abandoned and ceased to be operative unless the circumstances were otherwise explained. Where the Court makes an order striking off the case "for the present," or the circumstances show that the order striking off must have been only a temporary one, the order will not be deemed to be one finally disposing of the proceeding which will consequently be deemed pending.¹³ Similarly, an order striking off a proceeding for administrative or statistical purposes, is not a final disposal of the proceeding which must therefore be considered pending.¹⁴

10. (1894) 10 Cal 416 (423), *Bisua Sonan Chunder v. Binanda Chunder Dibingar Adhikar*.

(1927) A I R 1927 All 16 (19) 100 Ind Cas 692 49 All 276 (F B), *Chhattar Singh v. Kamal Singh*.

(1926) A I R 1926 All 403 (409) 94 Ind Cas 1005, *Sat Naram Lal v. Ganga Jal*.

(1887) 10 Mad 270 (271), *Aluar Ayyangar v. Seshammal*.

(1872) 17 Suth W R 219 (220), *Khoob Lal Singh v. Toolsee Singh*.

11. (1879) 4 Cal 877 (881) 3 Cal L R 161 4 Ind Jur 236, *Hurrenath Bhunjo v. Chunni Lal Ghose*.

12. (1936) A I R 1936 All 820 (823) : 166 Ind Cas 106 (F B), *Md. Taqi v. Raja Ram*.

12a (1873) 20 Suth W R 183 (186) 12 Beng L R 411. 3 Sar 268 (P C)

13. (1893) 21 Cal 387 (391), *Bashanta Nath Mitta v. Aghore Nath Bose*.

(1923) A I R 1923 All 471 (472) 71 Ind Cas 963, *Amjad Ali Khan v.*

(1891) 16 Bom 294 (302), *Chintamani Damodar Agashe v. Balshastra*.

(1931) A I R 1931 All 458 (460) 133 Ind Cas 316, *Prem Narain v. Ganga Ram* (Struck off "for the present")

(1930) A I R 1930 Mad 828 (829) 118 Ind Cas 769, *Subramania Chettiar v. Angappa Asari*

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Nota 143

Even where an execution proceeding is *properly* disposed of by a final order, it may be revived, where, for some reason not due to any default or neglect on the part of the decree-holder, it subsequently turns out that the order is untenable, inoperative or ineffective.^{14a} Thus, where property is sold in execution, the decree is satisfied and the execution struck off or closed, but the sale is subsequently set aside at the instance of the judgment-debtor, it has been held that the decree-holder can apply for the revival and continuation of the earlier proceeding.¹⁵

Where the circumstances are such that the decree-holder can ask for a revival of an earlier proceeding, even an application, in form one for *execution*, will be considered to be one for revival or continuation of earlier proceeding.¹⁶ For all intents and purposes there is not much difference between revival and continuation of the former application. The same effect is given to it. It is, however,

(1909) 3 Ind Order *Putti Kollaya.*

14a(1933) A I R 1933 Mad 418 (422) : 143 Ind Cas 1 : 56 Mad 490 (F B), *Bala Tripura Sundaramma v. Abdul Khader.*

15. (1916) A I R 1916 Cal 393 (399, 400) : 32 Ind Cas 699, *Krishna Prasad Singh v. Matichand.*

(1930) A I R 1930 Cal 329 (332) : 57 Cal 860 : 126 Ind Cas 263, *Alshoy Kumar Das v. Abdul Kader Khan.*

v. Abdool Khalaf
Huq v. Reayuddin.
Pat 829, *Radhakrishnan*

(1) Cas 707 : 10 Low Bur Rul 84.

(1) Cas 89 : 2 Pat L Jour 115, *Mt.*

our 815, *Bihari Lal*

decree, purchases property as belonging to judgment debtor and is made to pay in a suit by the real owners of the property, a subsequent application for execution is not a revival or continuation of the previous one which resulted in the abortive sale.¹⁷

(1918) A I R 1918 All 401 (402) : 45 Ind Cas 531, *Sundar Lal v. Ram Prasad Das.*

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16. (1927) A I R 1927 All 16 (18) : 100 Ind Cas 692 : 49 All 276 (F B), *Chhattar Singh v. Kamal Singh.*

(1922) A I R 1922 All 483 (493) : 65 Ind Cas 78, *Ram Lakhan Singh v. Fala Meena Lal.*

ul Khalaf.
v. Syud Nairr

(1921) A I R 1921 Oudh 31 (31) : 26 Oudh Cas 206 : 80 Ind Cas 775, *Mahar Hussain v. Qudrat Ali.*

(1914) A I R 1914 Oudh 430 (432) : 17 Oudh Cas 163 : 25 Ind Cas 160, *Girdhari Lal v. Damodar Das.*

[See also (1921) A I R 1921 Pat 367 (369) : 72 Ind Cas 862, *Dharohar Singh v. Ram Prasad Narain Sahai.*]

17. (1933) A I R 1933 Mad 418 (422) : 143 Ind Cas 1 : 56 Mad 490 (F B), *Tripura Sundaramma v. Abdul Khader.*

necessary before an application can be considered to be one for the revival or continuation of the previous proceeding, that the subsequent application must be of the *same nature as the previous one*. It must be for the same relief and against the same persons. Where the *character* of the subsequent application is different from that of the prior one in the above particulars, the later application will not be regarded as one for revival but as a fresh application.¹⁸

An application for revival or continuation of a previous proceeding is not governed by this Article,¹⁹ but by Article 181 which is a residuary Article governing all applications not provided for elsewhere in the First Schedule.²⁰ It was held in the undermentioned

18. (1918) A I R 1918 Mad 449 (449) : 43 Ind Cas 122, *Thiagarayan v. Kannuswami Pillai*,
(1884) 7 Mad 595 (596, 597) : 8 Ind Jur 613, *Virasami v. Athi*. (First

(1923) A I R 1923 Cal 572 (574, 575) 76 Ind Cas 455, *Rajendra v. Abdul*
(1932) A I R 1932 All 273 (278) 54 All 573 139 Ind Cas 583 (F B), *Gobardhan Das v. Dau Dayal*.

(1883) 7 Bom 293 (296), *Krishnaji Raghunath Kothavle v. Anandras Ballal Kothakar*.

(1895) 18 All 9 (11) : 1895 All W N 133, *Har Sarup v. Balgobind*.

(1912) 14 Ind Cas 172 (173) 34 All 896, *Khetpal v. Tikam Singh*.

(1924) A I R 1924 Pat 367 (369, 370) : 72 Ind Cas 862, *Dharohar Singh v. Ram Prasad Narayan Sahai*.

19. (1912) 14 Ind Cas 264 (265) : 36 Mad 553, *Subbachariar v. Muthucaram Pillai*.

20. (1934) A I R 1934 All 294 (296) : 148 Ind Cas 525, *Mt. Nabban Begam v. Mt. Moti Begam*

(1906) 28 All 651 (653) 1906 All W N 152 3 All L Jour 845, *Bihari Lal Missr v. Jagannath Prasad*

(1893) 6 All 23 (24) 1883 All W N 181, *Basant Lal v. Datul Bibi*

(1883) 5 All 243 (245) 1883 All W N 8, *Raghubans Gir v. Sheosaran Gir*.

(1931) A I R 1931 All 458 (460) 133 Ind Cas 316, *Prem Narain v. Ganga Ram*. (Assumed)

(1880) 5 Bom 29 (35, 37), *Kalyanbhai Dipchandbhai v. Ghansham Lal Jadunathji*.

(1930) A I R 1930 Cal 329 (332) 57 Cal 860 : 126 Ind Cas 268, *Akshoy Kumar Roy v. Abdul Kader Khan*

(1913) 20 Ind Cas 439 (441) (Cal), *Lal Gobind Nath Shah Deo v. Bhikar Sahu*.

(1911) 11 Ind Cas 972 (973) (Cal), *Sheikh Mahomed v. Wilham Alfred Thomas*

(1925) A I R 1925 Mad 981 (984) 88 Ind Cas 204, *Mangamma Nayakuralu v. Ramdasappa*.

(1924) A I R 1924 Mad 210 (211) 79 Ind Cas 779 47 Mad 176, *Manyam*

[But see (1910) 6 Ind Cas 537 (541) 37 Cal 796, *Madha Moni Dass v. Pamela Lambert*. (There is no rule of limitation applicable)]

(1878) 3 Cal L R 261 (263), *Golam Sahu v. Chutterbhooj Patuck*

(1909) 1 Ind Cas 341 (343) (Cal), *Abdul Khayar v. Reazuddin*. (Question of limitation does not arise)]

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Notes
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cases²¹ that the starting point of time under that Article for an application for revival and continuation of a pending proceeding accrued day by day.

On the other hand, in the cases cited below²² it has been held that where the execution has been arrested by some obstacle for which the decree-holder is not responsible, time for application for revival will begin to run from the date when the obstacle is removed.

144. Onus. — The burden of proving that an application for execution is not time-barred is on the applicant.¹ But where *prima facie* it is within time, it is for the opponent to show how it is not within time.² It was held in the undermentioned case³ that the *onus* of proving that the previous application was *in accordance with law* was also on the applicant. A contrary view, namely that the presumption is that an application is in accordance with law and that the *onus* of proving that it is not so is on the judgment-debtor, has been taken by the High Court of Madras.⁴

145. Local or special law. — A special or local law may prescribe a period of limitation for an application for execution different from that prescribed by this Article. In such cases, it is the period prescribed by such local or special law that will govern the application. See Section 29, *ante*.

146. Effect of bar of limitation. — The effect of not filing an execution application governed by this Article within the time prescribed by it is to render the decree or the order inoperative and unenforceable thereafter.¹ No Court can be called upon to take action

21. (1907) 31 Mad 71 (73, 76) : 18 Mad L Jour 46 : 3 Mad L Tim 829, *Chalacadi Kotiah v. Poloori Alamellammal*.
 (1925) A I R 1925 Mad 152 (152, 153) : 81 Ind Cas 897, *Puttaya Krishnayya Shanbaga v. Puttannayya*.
 (1912) 14 Ind Cas 264 (265) : 36 Mad 553, *Subba Chariar v. Muthucreeram Pillai*.
 22. (1914) A I R 1914 Oudh 430 (432) : 17 Oudh Cas 169 : 25 Ind Cas 160, *Girdhari Lal v. Damodar Das*.
 (1934) A I R 1934 All 294 (296) : 148 Ind Cas 525, *Mt. Nabban Begam v. Mt. Moti Begam*. (A I R 1927 All 16 (F B), Followed.)
 (1927) A I R 1927 All 802 (803) : 100 Ind Cas 790, *Mt. Basanti v. Sirdar Mai Hardit Rai*.
 (1920) A I R 1920 All 174 (175) : 42 All 564 : 56 Ind Cas 1006, *Balwant Singh v. Budh Singh*.
 (1926) A I R 1926 All 409 (410) : 91 Ind Cas 1005, *Sat Narain Lal v. Gangajal*.

Note 144

1. (1931) A I R 1931 Sind 160 (161) : 131 Ind Cas 1182 : 25 Sind L R 523, *Folkart Brothers v. Achrajram*.
 (1866) 5 Suth W R Misc 20 (20), *Bharut Singh v. Sadut Ali*.
 2. (1913) 19 Ind Cas 481 (485) (Lah), *Fateh Chand v. Mt. Menghi Bai*.
 3. (1931) A I R 1931 Sind 160 (161) : 131 Ind Cas 1182 : 25 Sind L R 523, *Folkart Brothers v. Achrajram*.
 4. (1926) A I R 1926 Mad 321 (322) : 92 Ind Cas 700, *Trustees, Parakkal Peraswom v. Venkatachalam Vadhyar*.

Note 146

1. (1868) 10 Suth W R 215 (215) : 14 Peng L R 371 (Note), *Ram Soondar Tevarce v. Sreenath Dewan*.

on such a decree,² even under its inherent powers³ Nor can such a decree be revived by any subsequent proceeding taken by the decree-holder,⁴ and it is immaterial that such proceeding is *bona fide*,⁵ or is permitted by the Court by inadvertence or is not opposed by the judgment-debtor.⁶

A decree-holder whose rights are barred cannot revert to the position which he held prior to the institution of the suit and bring a fresh suit on the same cause of action⁷ Such a suit would be barred on the principle of *res judicata*. This bar, however, will not apply where the subsequent suit is based on a cause of action arising subsequent to the date of the decree.⁸

If the execution of a decree against several judgment-debtors is time-barred as regards some judgment-debtors, it does not thereby become necessarily time-barred against others.⁹

147. Res judicata as applied to questions of limitation in execution proceedings.— See Note 19 to Section 3, *ante*.

(1850) 5 Cal 894 (897) . 6 Cal L R 437, *Shumbhoonath Shaha v. Guruchurn Lahiri*

(1925) A I R 1925 All 6 (S) . 63 Ind Cas 1033, *Md. Abdul Rahim Khan v. Ram Bharos.*

(1893) 1833 All W N 165 (165), *Sakibzad v. Aziz Bibi.*

(1867) Agra F B 78 (81) (1874 Edition p. 60), *Ramjeeewun Rai v. Deep Narain Rai.*

(1900) 33 Cal 679 (682), *Oman Sheikh v. Halakuri Sheikh.*

2 (1899) 1 Bom L R 84 (86), *Krishna Timmabhatta v. Vithal Govind Bhat.*

3 (1935) A I R 1935 Rang 466 (471) 13 Rang 595 . 159 Ind Cas 945, *K P L S S Chettyar v. Official Receiver, Ramnad*

4 (1866) 6 Suth W R Misc 118 (118), *Luchmun Sukoy v. Bhuguan Chunder.*
(1916) A I R 1916 Mad 729 (729) 30 Ind Cas 707 39 Mad 923, *Varadaraja Mudali v. Murugesam Pillai*

Bhagwan v. Dhondi.

Iar v. Asseemooddeen Sirdar.

Grija Kant Lahiry

23 Ind Cas 649, *Chandri Abdul*

5. (1879) 4 Cal 703 (709), *Mungol Prashad Dicht v. Shama Kanto Lahory Chowdhry.*

6. (1868) 9 Suth W R 390 (390, 391), *Ram Dhun Roy v. Khajanh Abdool Gunnee.*
(1880) 5 Cal 894 (897) 6 Cal L R 437, *Shumbhoonath Shaha v. Guruchurn Lahiri*

7.

8. See Notes 33 to 40 to S. 11 of the Authors' Civil Procedure Code.

9. (1900) 1 Ind Cas 18 (49) (Lah), *Banwari Lal v. Abdul Guffer.*

Article 183

<p>183.* To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council.</p>	<p>Twelve years.</p>	<p>When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right: Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be.</p>
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Synopsis

1. Legislative changes.
2. Scope.
3. Application by notice of motion : when deemed to be made.
4. "Enforce."
5. "Established by Royal Charter."
6. "In the exercise of its ordinary original civil jurisdiction."
7. Order of His Majesty in Council.
8. Starting point.
9. Person capable of releasing the right.
10. Revivor.
11. Acknowledgments and payments.

* Act of 1877, Article 180
Same as above.

Act of 1871, Article 169
Same as above except that the words "or an order of His Majesty in Council" were absent.

Act of 1859
No corresponding provision.

Other Topics

Article 183 Note 1

Application for final or personal decree in mortgage suit—Article not applicable	...	...	...	See Note 4, Pts. 3a, 4
Application for restitution as a result of order of His Majesty in Council	...	...	...	See Note 4, Pt. 6, 7
Application for transmission of decree does not amount to revivor	...	...	...	See Note 10, Pt. 7
Article not controlled by Section 48, C P C.	...	...	...	See Note 2, Pt. 8
Article 182 and this Article—Difference	...	See Note 2, Pts 1, 3, Note 4, Pt. 1	...	
Order recognizing assignment of decree	...	...	...	See Note 10, Pt. 11
Revivor of decree against one judgment-debtor inoperative against others	...	...	...	See Note 10, Pt. 12
Sections 6, 7 and 8—Not applicable	...	...	...	See Note 9

1. Legislative changes.—Section 19 of the Act of 1859 corresponded to this Article but did not contain the expressions "*in the exercise of its ordinary original civil jurisdiction*" and "*or an order of His Majesty in Council*" In view of the absence of the former expression, it was held in a number of cases,¹ that the execution of decrees etc., of a Chartered High Court passed in the exercise of its *appellate jurisdiction* also would be governed by Section 19 referred to above. A Full Bench of the High Court of Calcutta,² on the other hand, held that Section 19 was never intended to apply and did not apply to decrees etc., passed by Chartered High Courts in the exercise of their *appellate jurisdiction*. In the undermentioned case³ their Lordships of the Privy Council observed that the preponderance of authority in India^{3a} was in favour of the proposition that the execution of the decrees of the High Court made on its Appellate Side was subject to three years' rule of limitation, and that the High Courts, though unquestionably "Courts established by Royal Charter" in the broad and general sense of the term were not, when exercising their appellate jurisdiction from the moffusil Courts, such Courts within the meaning of the Act of 1859.

The Act of 1871 gave effect to this view by inserting in Article 169 thereof, corresponding to Section 19 of the Act of 1859, the words "*in the exercise of its ordinary original civil jurisdiction*" But this Article also, like Section 19 of the older Act, did not contain the expression "*or any order of His Majesty in Council*" The

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1. (1867) 8 Suth W R 267 (268), *Ishan Chunder Choudhry v. Jugodishures Chowdhram*.
(1867) 8 Suth W R 470 (472), *Kishen Kinkur Ghose v. Buroda Kant Roy*
(1870) 14 Suth W R 289 (289) 6 Beng L R 52, *Chowdhry Wahid Ali v. Mullick Enayat Ali*
2. (1871) 16 Suth W R F B 1 (6) 7 Beng L R 704 (F B), *Ram Churn Bysack v. Luchhee Kant Bornick*.
3. (1872) 14 Moo Ind App 465 (484) 10 Beng L R 101. 17 Suth W R 292 2 Suther 561 3 Sar 62 (P C), *Kristo Kinkur Roy v. Rajah Burroda-caunt Roy*
- 3a See (1874) 21 Suth W R 391 (391), *Hurbans Lal v. Sheo Narain Singh*
(1871) 16 Suth W R F B 1 (6) 7 Beng L R 704 (F B), *Ramchuran Bysack v. Luchhee Kant Bornick*.
(1870) 5 Mad H C R 215 (218), *Arunachalla Thudayan v. Veludayan*.

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absence of these words both in the Act of 1859 and in the Act of 1871 gave rise to a difference of opinion as to the period of limitation applicable to the execution or enforcement of orders of Her Majesty in Council. In the undermentioned case⁴ it was held that applications for such enforcement were governed by the three years' rule of limitation governing execution of decrees in general, while in a later Full Bench decision⁵ it was held that there was no limitation at all applicable to such cases. In this state of circumstances, the words "or an order of Her Majesty in Council" were added to Article 169 by Section 21 of the Privy Council Appeal Act (VI of 1874). Article 180 of the Act of 1877 repeated Article 169 of the Act of 1871 as amended by Act VI of 1874. There is no difference between the present Article and Article 180 of the Act of 1877.

2. Scope.—This Article applies to applications to enforce a judgment, decree or order of a *Chartered High Court* in the exercise of its ordinary original civil jurisdiction, or an *order of His Majesty in Council*. Article 182 *ante*, applies to the execution of the decrees of Civil Courts not provided for by this Article. The two Articles provide different periods of limitation for execution of decrees and the difference is made to depend solely on the *character of the Court* which passed the decree. Limitation therefore depends not on the character of the Court *to which a decree is sent for execution*, but on the character of the Court *which passed it*. Thus, when a decree of a Chartered High Court passed in its ordinary original civil jurisdiction is transmitted for execution to a *moffusil* Court, the limitation applicable is twelve years under this Article and not three years under Article 182.¹

When an award is filed under Section 15 of the Arbitration Act, it is not only to be enforceable as if it were a decree in general, but having been filed in a particular Court it is to be enforceable as if it

4. (1865) 4 Suth W R Misc 10 (11), *Dr. Alexander Wise v. Juggobundoo Baboo*.
- (1881) 7 Cal 620 (622, 627) : 9 Cal L R 402 : 4 Shome L R 211, *Gopal Sahu Deo v. Joyram Tewary*. (Case under Article 167, Limitation Act of 1871—'Appeal' includes appeal to the Privy Council and 'Appellate Court' includes the Judicial Committee of the Privy Council)
- (1879) 2 All 763 (764), *Narsingh Das v. Narain Das*. (Case under Article 179 (2) of Limitation Act of 1877.)
5. (1866) 6 Suth W R Misc 69 (70) : Beng L R Sup Vol 506, *Anundmoyee Dossee v. Poorno Chunder Rai*.

Note 2

1. (1890) 17 Cal 491 (497), *Tincowrie Dawn v. Debendro Nath Mooherjee*.
- (1896) 24 Cal 478 (490, 491), *Jogemaya Dassi v. Thachomoni Dassi*.
- (1903) 31 Mad 24 (27) : 17 Mad L Jour 441 : 3 Mad L Tim. 19, *Sambanra Mudaliar v. Panchanada Pillai*.
- (1911) 11 Ind Cas 635 (637) : 36 Mad 103, *Krishna Doss v. Alambu Ammal*.
- (1928) A I R 1928 Rang 317 (317) : 114 Ind Cas 674 : 6 Rang 566, *Alahai Mohamed v. Mahomad Noor Mahomed*. (Decree of Chief Court of Lower Burma executed by Rangoon High Court—Limitation for execution is governed by Article 182 and not by Article 183.)
- (1919) A I R 1919 Lah 95 (96) : 49 Ind Cas 942, *Kanji Mal v. Kilar Naik*.

were a decree of that Court. When such award is filed in a Chartered High Court, this Article will govern its enforcement.²

The Article does not refer to Section 48 of the Code of Civil Procedure as Article 182 does, and is not in any way controlled by it.³ This is also made clear by clause (b) of Section 48 sub-section 2 of the Code which expressly exempts this Article from its operation.

3. Application by notice of motion : when deemed to be made.—Under the English practice, certain applications have to be made to the Court upon a notice of motion. Such notice is given by the solicitor for the party who wishes to make the motion to the solicitor for the opposite party stating that the Court will be moved on a particular day at a particular time.¹ In *In re An Arbitration between Gallop and the Central Queensland Meat Export Co.*,² it was held by Denman, J., that the notice of motion, i. e. the service of such notice on the solicitor for the opposite party, must be treated as an application for the purposes of limitation. In this country also, certain applications in the High Courts have to be made upon notice of motion. But the procedure in such cases is that a party prepares a notice in the prescribed form and submits it along with a copy thereof to the Bench Clerk or Assistant Registrar or other officer for insertion of the return day and signature by him. The original and copy are then sealed with the seal of the Court and the copy returned to the party who then serves it on the opposite party or his pleader.³ It has been held by the High Court of Bombay, following *Gallop's case*,² that the *filing* of the notice of motion in the proper office of the Court for signature and seal is an application for the purposes of limitation.⁴

The High Court of Calcutta, on the other hand, held in *Khettra Mohan Singh v. Kasi Nath Seth*,⁵ that the mere *issue* of a notice of motion calling upon another to attend a Judge in Chambers on the hearing of an application is not sufficient to save the application from being barred if the hearing of the application comes on after time. That case was followed by the same High Court in *Hinga*

2 (1927) A I R 1927 Cal 853 (855) 101 Ind Cas 808 55 Cal 499, *Belvedere Jute Mills Ltd v. Hardwarimull & Co.*

3. (1882) 6 Bom 258 (260), *Mayabhai Prembhai v. Tribhuvandas Jagannadas*

(1893) 20 Cal 551 (557), *Futleh Narain Chowdhry v. Chundrabati Choudhram*

(1884) 7 Mad 510 (545), *Ganapathi v. Balasundara*.

(1909) 1 Ind Cas 168 (174) 36 Cal 543, *Jogendra Chandra Roy v. Shamdas*.

Note 3

1 See O 52 Rr. 3 to 10 of the Rules of the Supreme Court, 1883 and Form 18 of Appendix B thereto.

2 (1890) 38 W R (Eng) 621 (621) 59 L J Q B 460 25 Q B D 230 62 L T 834.

3 See O 13 Rr 1, 2, 7 and 8 of the Original Side Rules of the Madras High Court.

4 (1924) A I R 1924 Bom 36 (39) 47 Bom 764 86 Ind Cas 440, *Venkatapaya v. Naterally*.

5. (1893) 20 Cal 899 (902).

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Bibi v. Manna Bibi,⁶ and it was held that even the service of the notice of motion on the opposite party would not prevent time running. In neither of the two cases above mentioned was *Gallop's case* referred to, and on this ground it was held by a single Judge of the same High Court in the undermentioned case⁷ that the service of the notice of motion on the opposite side is an application for purposes of limitation, whatever may be the view as to the effect of the issue of a notice of motion.

In *Kuttayan v. Mannanna Ellappa*,⁸ where a notice of motion was issued and served on the same day on the opposite party, it was held by the High Court of Madras, dissenting from *Khetra Mohan's case* and *Hinga Bibi's case* (*supra*), that the application must be deemed to have been made on the date of the issue of the notice of motion. It was further held that this would be so even though the affidavit supporting the application was sworn to only later.

In the undermentioned case,⁹ where a tabular statement under Order 21 Rule 11, Civil Procedure Code, was filed in Court within time, it was held by Costello, J., that that amounted to the making of an application. His Lordship also doubted the correctness of the two earlier cases of the Calcutta High Court as to the issue of a notice of motion not being a valid application for the purposes of limitation.

4. "Enforce." — While Article 182 refers to the execution of a decree or order of any Civil Court, this Article refers to the enforcement of a judgment, etc. The words "to enforce" are wider than the words "to execute" and should be interpreted as equivalent to "to give full effect to."¹ They are not limited to realization by execution, and even if a proceeding is not strictly in execution but is a form of judicial relief under the decree, it would still come within the meaning of the expression "to enforce a decree." Thus, where in a mortgage decree the decree-holder makes an application praying that he may be at liberty to add a person as party defendant to the suit and that therefore he may be at liberty to proceed to sell properties pursuant to the decree, the application will be one "to enforce a judgment" within the meaning of Article 183.² But an application for an order for transmission of execution to another Court is not one for execution and cannot save limitation.^{2a}

⁶ (1903) 81 Cal 150 (154) : 8 Cal W N 97.

⁷ (1903) 4 I R 1003 Cal 886 (1003) : 147 Ind Cas 797 : 60 Cal 1106, *Jnanendra* (under Article 166)

⁸ (1911) 11 Ind Cas 913 (915) : 33 Cal 913, *Amlool Chand Parai v. Saraf Chunder Mulgerjee*.

⁹ (1932) A I R 1932 Lah 110 (111) : 41 Pat L Jour 105, *Rughnath & Co. v. Firm Ram Gopal Rohit Ram*.

Note 4

1. (1928) A I R 1928 All 293 (294) : 50 All 767 : 112 Ind Cas 876, *Sohan Bibi v. Bijnath Das*.
- (1922) A I R 1922 All 238 (240) : 66 Ind Cas 545 : 41 All 535, *Darf Lal v. Damodar Das*.
2. (1911) 11 Ind Cas 913 (915) : 33 Cal 913, *Amlool Chand Parai v. Saraf Chunder Mulgerjee*.
- 2a (1932) A I R 1932 Lah 110 (111) : 41 Pat L Jour 105, *Rughnath & Co. v. Firm Ram Gopal Rohit Ram*.

Das v. Bepin Behari Dhur, 115 Ind Cas 83, *Atarmoni*

Where a preliminary mortgage decree has been passed by the Original Side of the High Court, an application under Section 89 of the Transfer of Property Act for an order absolute was held to be one to enforce the judgment within the meaning of this Article.³ But these decisions were given with reference to the law as it stood before the Civil Procedure Code of 1908 was enacted. Having regard to the form of the decrees which are now passed in mortgage suits, and having regard to the terms of Order 34 Rule 3 sub-rule 2 of the Code, an application for a final decree cannot be said to be an application to enforce the preliminary decree and such an application will be governed by Article 181 and not by this Article.^{3a} An application for a personal decree under Order 34 Rule 6 of the Civil Procedure Code is an application for a new decree in the suit and not an application for enforcing a judgment or decree Article 181 and not this Article applies to it.⁴

An application against the sons for execution of a Privy Council decree against the father for costs is governed by this Article and limitation commences to run from the date of the decree.⁵

There is a difference of opinion as to whether an application for restitution as a result of an Order of His Majesty in Council is one to enforce the Order in Council within the meaning of this Article. According to the High Court of Allahabad, this Article applies to such applications.⁶ A contrary view has been held by the High Court of Patna.⁷

5. "Established by Royal Charter."—The Sudder Court which had been established before the Supreme Courts in India was a Court not established by Royal Charter, and Section 19 of the Act of 1859 was held not to apply to the enforcement of decrees of that Court.¹

3. (1914) A I R 1914 P C 150 (153) 42 Cal 776 42 Ind App 88 27 Ind Cas 683 (P C), *Munna Lal Parruck v Sarat Chunder Mukerji*.

(1916) A I R 1916 Mad 288 (289) 29 Ind Cas 237 39 Mad 544, *Mohomad Hussain Sahib v. Abdul Kareem Sahib*.

3a (1935) A I R 1935 Rang 239 (240) 13 Rang 325 157 Ind Cas 784, *M. A. L. M. Chettiar Firm v. Maung Po Hmyin*.

4. (1925) A I R 1925 Cal 834 (836, 845) 52 Cal 828 89 Ind Cas 1 (F B), *Francis Higgins Fell v. Minnie Gregory*.

(1935) A I R 1935 Rang 187 (189) 13 Rang 305 156 Ind Cas 701, *Chockalingam v. Maung Tun Yin*.

5 (1932) A I R 1932 Pat 261 (264) 11 Pat 445 139 Ind Cas 397, *Chandra Chur Deo v. Mt Shyam Kumari*.

6 (1922) A I R 1922 All 238 (239) 44 All 555 66 Ind Cas 545, *Brij Lal v. Damodar Das*.

(1928) A I R 1928 All 293 (294) 50 All 767 112 Ind Cas 876, *Sohan Bibi v. Baijnath Das*.

(1921) 61 Ind Cas 806 (807) (All), *Madhusudan Das v. Brij Lal*.

7. (1927) A I R 1927 Pat 208 (208) 6 Pat 252 102 Ind Cas 614, *Jugal Kishore v. Homeshwar Singh*.

Note 5

1. (1869) 12 Suth W R 343 (313), *Huro Pershad Roy Chowdhry v. Manick Lushkur*.

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But the Supreme Court was established by Royal Charter and the enforcement of its judgments was held to be governed by Section 19 of the said Act.²

By Section 164 of the Companies Act, 1913, the District Judge has the same jurisdiction and the same powers as the High Court. But it cannot be said that the District Judge becomes, by virtue of that Section, "the High Court" for the purpose of enforcing a payment order under the said Section. This Article therefore does not apply to the enforcement of such an order.³

6. "In the exercise of its ordinary original civil jurisdiction." — This Article applies only to judgments, decrees and orders of the Chartered High Courts in the exercise of their ordinary original civil jurisdiction. Ordinary jurisdiction embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it, as opposed to extraordinary jurisdiction, which the Court may assume at its discretion upon special occasions and by special orders.¹ A judgment ordered to be entered up under Section 86 of the Indian Insolvency Act is a judgment passed by the High Court in the exercise of its ordinary original civil jurisdiction.²

The words "original jurisdiction" clearly exclude *appellate* jurisdiction. The enforcement of judgments etc. passed by the High Court in its appellate jurisdiction is therefore not within this Article.³

7. Order of His Majesty in Council. — Before the decision of the Full Bench in *Luchman Prasad v. Kishan Prasad*,¹ there was a difference of opinion as to whether the Article applied to the execution of Orders in Council passed in cases decided by the High Court in its *appellate* jurisdiction. It was settled by the Full Bench, referred to, that where an order of Her Majesty in Council modifies, alters or confirms the decree of the High Court, whether passed in

(1869) 12 Suth W R 73 (73), *Thakoor Doss Gossain v. Kashree Nath Munda*

2. (1862) 1 Mad H C R 201 (205), *Coultroup v. Smith*.

3. (1938) A I R 1938 Lah 368 (368), *Panna Lal Jain v. Jain Bank of India Ltd*

Note 6

1. (1889) 13 Bom 520 (533) : 16 Ind App 156 : 13 Ind Jur 251 : 5 Sar 400 (P C), *Candas Narrondas Natvahu v. C. A. Turner*.

2. (1887) 11 Bom 123 (152), *In the matter of Candas Narrondas*. (Per West, J.)

(1889) 13 Bom 520 (533) : 16 Ind App 156 : 13 Ind Jur 251 : 5 Sar 400 (P C), *In the matter of Candas Narrondas Natvahu v. C. A. Turner*.

(1905) 33 Cal 560 (564) : 9 Cal W N 952, *Annoda Prasad v. Nobe Kishore Roy*. (Per Sale, J. — Though the High Court exercises a special jurisdiction under the Insolvency Act, the High Court nevertheless exercises it as a part of the ordinary jurisdiction with which it is vested.)

3. (1874) 21 Suth W R 391 (391), *Hurbans Lall v. Sheo Naram Singh*.

Note 7

1. (1862) 5 Cal 218 (223) : 10 Cal L R 425 : 4 Shome L R 261 (P 18)

its original or appellate jurisdiction, that order is the paramount decision in the suit and its enforcement is governed by this Article.

See also the undermentioned cases² to the same effect.

But when the Privy Council dismisses an appeal for *want of prosecution*, there is no final decree or order of His Majesty in Council as the matter of the suit is not judicially dealt with and the order cannot be regarded as an order adopting or confirming the decision appealed from. When such an order is made, the only decree capable of execution is the decree appealed from and if it has been passed by the High Court in its *appellate* jurisdiction, the enforcement of such decree is not governed by this Article.³ The same principle will apply where the appeal before the Privy Council is withdrawn without further prosecution.⁴

Where the preparation of a final decree was a purely ministerial act to enable the Order in Council to be enforced, it was held that it could not be contended that the execution proceedings were not taken to enforce the Order of His Majesty in Council.⁵

The Court executing the decree is not competent to go behind the order passed by His Majesty in Council whether right or wrong, the only duty of the Courts in India being to give effect to the order, punctually observe, obey and carry the same into execution⁶ In receiving and filing for the purposes of execution an order of the Privy Council, the High Court does not exercise any discretionary power but performs a function of purely ministerial character⁷

8. Starting point.—Time, under this Article, runs from the date when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right (See Note 9.)

- 2 (1893) 20 Cal 551 (555), *Putteh Naram Choudhry v Chundrabati Chowdhraim*
- (1900) 23 All 152 (157) 27 Ind App 209 5 Cal W N 52 2 Bom L R 978 10 Mad L Jour 290 7 Bar 788 (P C), *Bhup Indar Bahadur Singh v Bijai Bahadur Singh*
- (1909) 4 Ind Cas 402 (403) (Cal), *Kanims Debi v Aghore Nath Mookerjee*
- (1873) 19 Suth W R 186 (187), *Ganesh Dutt Singh v. Mungree Ram Chowdhry.*
- 3 (1914) A I R 1914 P C 66 (67) 23 Ind CIs 649 36 All 950 (P C), *Abdul Majid v Jawahir Lal*
- (1914) A I R 1914 P C 65 (66) 36 All 281 41 Ind App 104 23 Ind Cas 644 (P C), *Batul Nath v. Mt Munni Dei.*
- 4 (1921) A I R 1921 Mad 126 (131) 61 Ind Cas 979, *Viswanatha Sastri v. Sitalakshmi Ammal*
- (1921) A I R 1921 Pat 280 (283) 58 Ind Cas 977, *Krishna Prasad v. Wazir Narain Singh.*
- 5 (1924) A I R 1924 Pat 576 (579) 3 Pat 596 76 Ind Cas 766, *Mt Bhagwanta Kuer v Zamir Ahmad Khan*
- 6 (1925) A I R 1925 Pat 40 (41) 3 Pat 327 79 Ind CIs 794, *Somer Singh v Mt Prem Dei*
- 7 (1895) 22 Cal 950 (972), *Premilall Mullick v Sumbhoonath Roy*
- (1914) A I R 1914 Mad 222 (224) 38 Mad 831 22 Ind Cas 235, *Krishna Bhoopathi v Raja of Vijayanagarain*

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A fresh starting point is also furnished by —

1. A revivor of such judgment, decree or order. (See Note 10 *infra*.)
2. A part payment of the principal money secured by such judgment, etc.
3. A payment of interest on such money.
4. An acknowledgment of the right thereto, in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent.

9. Person capable of releasing the right.—The words "capable of releasing the right" exclude persons who are legally incapacitated, such as infants and lunatics. In the case of such persons, therefore, time under this Article does not *begin to run at all* until the incapacity is removed. Sections 6, 7 and 8 *ante*, do not govern this Article which is self-contained. A decree was passed in favour of a minor on the 30th November 1915, and the minor attained majority in October 1918. He made an application on the 31st March 1923, to enforce the decree, more than twelve years from the date of the decree but within twelve years of the date of his attainment of majority. If Sections 6 and 7 read with Section 8 applied to the case, the application was obviously barred by limitation. It was held by the Patna High Court that those Sections did not apply and that the application having been made within twelve years of the applicant's becoming "capable of releasing the right" within the meaning of this Article, there was no bar.¹

10. Revivor.—The term "revivor" in this Article refers to the Common Law practice which prevailed in the Supreme Courts in India under which, if a writ of execution was not sued out within a year and a day, it was necessary to revive the decree by a process known as *scire facias* or more fully *scire facias quare executionem non habiat*, that is to say, by calling on the judgment-debtor to show cause why the plaintiff should not have execution against him. The doctrine has its origin in the presumption of satisfaction which was held to arise when execution had not been applied for within a year and a day after the date of the judgment.

When the Code of Civil Procedure came to be enacted in 1852, the rule was embodied in Section 248 thereof and is now found in Order 21 Rule 22 of the Code under which, when an application is made more than one year after the date of the decree, notice is to go to the person against whom execution is prayed, requiring him to show cause on a date to be fixed, why the decree should not be executed against him.¹

Note 9

1. (1930) A I R 1930 Pat 141 (142) : 123 Ind Cas 411, *Muskar Sahu v. Kushn Narayan Prasad*.

Note 10

1. (1916) A I R 1916 Mad 513 (513) : 40 Mad 1127 : 40 Ind Cas 603, *Krushnaya v. Gajendra Naidu*.
- (1907) 1 Ind Cas 163 (170) : 36 Cal 543, *Jogendra Chandra Roy v. Syam Das*. (Object of writ of *scire facias* discussed)

It follows from what has been stated above, that in order to constitute a "revivor" of the decree, there must be, expressly or by implication, a *determination* by a Court or other person duly qualified to make it, that the decree is still capable of execution, and that the decree-holder is entitled to enforce it. An *order for execution* operates as a revivor, because it necessarily implies such a determination.^{2a} Where the objection of the judgment-debtor is overruled and it is decided that the decree is not barred by limitation, the effect of the order is to entitle the decree-holder to proceed with the execution and hence there is a revivor.² An order for execution made after such notice as is required by Order 21 Rule 22 has the effect of reviving the decree within the meaning of this Article.³ But the mere issue or service of a notice under Order 21 Rule 22 is not sufficient. A further order by the Court is necessary to constitute revivor.⁴

Where execution cannot proceed without the leave of the Court, the granting of that leave will have the effect of reviving the decree. But where no such leave is required, the mere issue of notice of execution does not constitute revivor.⁵

The determination referred to above must be by a Court or person duly *qualified to make it*. Where the Registrar of the Court had no power to decide whether the decree was or was not capable of execution but passed orders that execution should issue, it was held that such an order did not operate as a "revivor."⁶

2a (1933) A I R 1938 Pat 372 (373) · 176 Ind Cas 566, *Sarju Singh v. Bhagwat Prasad Singh*

2. (1909) 4 Ind Cas 402 (403) (Cal), *Kamini Devi v. Aghore Nath Mukherjee*.
(1916) A I R 1916 Cal 488 (491) 43 Cal 903 36 Ind Cas 602 (FB), *Chatterput Singh v. Sait Sumari Mal*

3. (1881) 6 Cal 504 (511) 8 Cal L R 23, *Ashootosh Dutt v. Doorga Churn*.
(1897) 24 Cal 244 (247), *Suja Hoosein v. Monohur Das*
(1904) 26 All 361 (364) 1904 All W N 51 1 All L Jour 80, *Umrao Singh v. Lachmi Narain*

(1893) 20 Cal 551 (559), *Futteh Narain Chowdhry v. Chundrabati*

(1894) 7 Mad 540 (543), *Ganapati v. Balasundara*

(1909) 1 Ind Cas 168 (173) 86 Cal 543, *Jogendra Chandra Roy v. Syam Das*.

(1937) A I R 1937 Pat 321 (323) 15 Pat 316 169 Ind Cas 872, *Ghasiram Marwari v. Shiba Prasad Singh*

(1938) A I R 1938 Pat 372 (373, 374) 176 Ind Cas 566, *Sarju Singh v. Bhagwat Prasad Singh* (Issuing notice under O 21 R 22, Civil

time)

4. (1925) A I R 1925 Cal 668 (671) 87 Ind Cas 61, *Amulya Ratan v. Banku Behari*

(1903) 30 Cal 979 (981, 982) 7 Cal W N 793, *Monohar Das v. Futteh Chand*

5 (1915) A I R 1915 Cal 350 (351) 11 Ind Cas 216, *Chatterput Singh v. Daya Chand Marwari*.

6 (1916) A I R 1916 Cal 488 (491, 492) 43 Cal 903 . 36 Ind Cas 602 (FB), *Chatterput Singh v. Sait Sumari Mal*

(1936) A I R 1936 Pat 398 (399) 15 Pat 102 . 163 Ind Cas 411, *Sarju Singh v. Bhagwat Prasad*

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An application for transmission of a decree from the High Court to the District Court is not by itself a revivor of the decree within the meaning of this Article.⁷ Even an order transferring the decree for execution to another Court does not give a new starting point of limitation *qua* the order of transmission.⁸

An order of dismissal of an execution case for want of prosecution does not amount to a revivor.⁹ Nor can the dismissal of an application by the judgment-debtor to set aside the decree, filed by him pending execution, be regarded as an order determining the question whether the decree-holder has a subsisting right to execute the decree. Such an order does not therefore fall within the definition of revivor.¹⁰

An order recognizing the assignment of a decree and allowing the assignee to execute it, constitutes a revivor.¹¹

A revivor of a decree against one joint judgment-debtor will not keep it alive against joint judgment-debtors.¹² So also, where a mortgage decree determines the rights of prior and puisne mortgagees and allows each mortgagee to enforce his mortgage, the puisne mortgagee is not entitled to claim that his right to execute the decree accrued only after the prior mortgagee had exhausted his remedies, and execution applications by the prior mortgagee will not amount to a revivor of the right of the puisne mortgagee.¹³

11. Acknowledgments and payments. — See Note 37 to Section 20, *ante*.

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7. (1927) A I R 1927 P C 73 (75) : 101 Ind Cas 24 : 54 Cal 500 : 54 Ind App 129 (PC), *Banku Behary Chatterji v. Naraindas Dutt*
 (1915) A I R 1915 Cal 350 (351) : 11 Ind Cas 216, *Chutterput Singh v. Daya Chand Marwari*.
 (1925) A I R 1925 Cal 23 (25) : 84 Ind Cas 68, *Salaluddin v. Afsal Begum*.
 (1925) A I R 1925 Cal 213 (216) : 78 Ind Cas 1001, *Narain Das Dutt v. Banku Behary Chattopadhyaya*.
 8. (1916) A I R 1916 Cal 483 (494) : 43 Cal 903 : 36 Ind Cas 602 (FD), *Chutterput Singh v. Sait Sumari Mal*.
 (1929) A I R 1929 Mad 252 (253) : 118 Ind Cas 775 : 52 Mad 590, *Palaniappa Chettiar v. Valluammas Achi*.
 (1937) A I R 1937 Rang 477 (479) : 173 Ind Cas 160 : 1937 R L R 287, *Kannappa v. Ishaar Singh*.
 9 (1925) A I R 1925 Cal 663 (670) : 87 I. C. 61, *Amulya Ratan v. Banku Behary*.
 10 (1923) A I R 1923 Cal 686 (689) : 55 Cal 578 : 110 Ind Cas 401, *Muthiar Chettiar v. Chidambaram Chetty*.
 11 (1929) A I R 1929 Mad 252 (256) : 52 Mad 590 : 118 Ind Cas 775, *Palaniappa Chettiar v. Valluammas Achi*.
 12. (1918) A I R 1918 Mad 513 (514) : 40 Mad 1127 : 40 Ind Cas 603, *Krishnaswamy v. Gajendra Naydu*.
 [See also (1916) A I R 1916 Mad 1033 (1039) : 31 Ind Cas 1003 : 33 Mad 1102, *James Russel McLaren v. Veeriah Naydu*]
 13. (1927) A I R 1927 Cal 213 (217) : 78 Ind Cas 1001, *Narain Das Dutt v. Banku Behary Chattopadhyaya*.



THE SECOND SCHEDULE

Repealed by S. 3 and Second Schedule of the Repealing and Amending Act, 1930 (8 of 1930).

The Second Schedule before the repeal was as follows :

THE SECOND SCHEDULE

TERRITORIES REFERRED TO IN SECTION 31.

(See Section 31.)

The Presidency of Fort St. George

The Presidency of Bombay.

The Sambalpur District of the Bengal Division of the Presidency of Fort William.

The United Provinces of Agra and Oudh.

Burma.

The Central Provinces.

Ajmer-Merwara.

THE THIRD SCHEDULE
*Repealed by S. 3 and Second Schedule of the Second
 Repealing and Amending Act, 1914 (17 of 1914).*

The Third Schedule before the repeal was as follows :

THE THIRD SCHEDULE.

ENACTMENTS REPEALED.

(See Section 32.)

Year.	No.	Short title.	Extent of repeal.
1877	XV	The Indian Limitation Act, 1877.	The whole.
1877	XVII	The Punjab Courts Act, 1877.	So much as has not been repealed.
1879	XII	The Registration and Limitation Acts Amendment Act, 1879.	In the title the words "and the Limitation Act, 1877," and after section 107, from the words "and whereas" to the end of the Act.
1881	V	The Probate and Administration Act, 1881.	Section 156.
1887	IX	The Provincial Small Cause Courts Act, 1887.	Section 36.
1888	VII	The Civil Procedure Code Amendment Act, 1888.	In the title and in the preamble, the words "and the Indian Limitation Act, 1877," and of section 66 so much as has not been repealed.
1892	VI	The Indian Limitation Act and Civil Procedure Code Amendment Act, 1892.	In the title and in the preamble, the words "the Indian Limitation Act, 1877," and section 1.
1899	X	The Carriers Act, 1899.	Section 3.
1900	VI	The Lower Burma Courts Act, 1900.	So much of section 47 and the first schedule as relates to the Indian Limitation Act, 1877.
1900	XI	The Indian Limitation Amendment Act, 1900.	The whole.
1906	IV	The Presidency Small Cause Courts Act, 1906.	Section 5.

APPENDIX



The Punjab Limitation (Custom) Act (1 of 1920).

AN ACT TO AMEND AND CONSOLIDATE THE LAW GOVERNING THE LIMITATION OF SUITS RELATING TO ALIENATIONS OF ANCESTRAL IMMOVABLE PROPERTY AND APPOINTMENTS OF HEIRS BY PERSONS WHO FOLLOW CUSTOM IN THE PUNJAB.

WHEREAS it is expedient to amend and consolidate the law governing the limitation of suits relating to alienations of ancestral immovable property and appointments of heirs by persons who follow custom in the Punjab;

AND whereas the previous sanction of the Governor-General has been accorded under Section 79 (2) of the Government of India Act, 1915, to the passing of this Act;

IT is hereby enacted as follows :

Short title and extent. 1. (1) This Act may be called the Punjab Limitation (Custom) Act, 1920.

(2) It extends to the Punjab.

Repeal. 2. The Punjab Limitation (Ancestral Land Alienation) Act, 1900, is hereby repealed.

Definition 3. In this Act —

“Alienation” includes any testamentary disposition of property.

“Appointment of an heir” includes any adoption made or purporting to be made according to custom.

Savings. 4. This Act shall not affect any suit pending in any Court on the date on which this Act comes into force

5. Subject to the provisions contained in Sections 4 to 35 (inclusive), of the Indian Limitation Act, 1908, and notwithstanding anything to the contrary contained in the first schedule of the said Act, every suit, of any description specified in the schedule annexed to this Act, instituted after the period of limitation prescribed therefor in the schedule shall be dismissed, although limitation has not been set up as a defence

6. Notwithstanding anything herein contained, any suit for which period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, or by the Punjab Limitation (Ancestral Land Alienation) Act, 1900, may be instituted within the period of one year next after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, or by the Punjab Limitation (Ancestral Land Alienation) Act, 1900, whichever period expires first.

Provision for suits for which the period prescribed is shorter than that prescribed by the Indian Limitation Act or the Punjab Limitation Act.

THE THIRD SCHEDULE
*Repealed by S. 3 and Second Schedule of the Second
 Repealing and Amending Act, 1914 (17 of 1914).*

The Third Schedule before the repeal was as follows :

THE THIRD SCHEDULE.

ENACTMENTS REPEALED.

(See Section 32.)

Year.	No.	Short title.	Extent of repeal.
1877	XV	The Indian Limitation Act, 1877.	The whole.
1877	XVII	The Punjab Courts Act, 1877.	So much as has not been repealed.
1879	XII	The Registration and Limitation Acts Amendment Act, 1879.	In the title the words "and the Limitation Act, 1877," and after section 107, from the words "and whereas" to the end of the Act.
1881	V	The Probate and Administration Act, 1881.	Section 156.
1887	IX	The Provincial Small Cause Courts Act, 1887.	Section 36.
1888	VII	The Civil Procedure Code Amendment Act, 1888.	In the title and in the preamble, the words "and the Indian Limitation Act, 1877," and of section 66 so much as has not been repealed.
1892	VI	The Indian Limitation Act and Civil Procedure Code Amendment Act, 1892.	In the title and in the preamble, the words "the Indian Limitation Act, 1877," and section 1.
1899	X	The Carriers Act, 1899.	Section 3.
1900	VI	The Lower Burma Courts Act, 1900.	So much of section 47 and the first schedule as relates to the Indian Limitation Act, 1877.
1900	XI	The Indian Limitation Amendment Act, 1900.	The whole.
1906	IV	The Presidency Small Cause Courts Act, 1906.	Section 5.

APPENDIX

The Punjab Limitation (Custom) Act (1 of 1920).

AN ACT TO AMEND AND CONSOLIDATE THE LAW GOVERNING THE LIMITATION OF SUITS RELATING TO ALIENATIONS OF ANCESTRAL IMMOVABLE PROPERTY AND APPOINTMENTS OF HEIRS BY PERSONS WHO FOLLOW CUSTOM IN THE PUNJAB.

WHEREAS it is expedient to amend and consolidate the law governing the limitation of suits relating to alienations of ancestral immovable property and appointments of heirs by persons who follow custom in the Punjab;

AND whereas the previous sanction of the Governor-General has been accorded under Section 79 (2) of the Government of India Act, 1915, to the passing of this Act;

It is hereby enacted as follows :

Short title and extent. 1. (1) This Act may be called the Punjab Limitation (Custom) Act, 1920.

(2) It extends to the Punjab.

Repeal. 2. The Punjab Limitation (Ancestral Land Alienation) Act, 1900, is hereby repealed.

Definition 3. In this Act —

"Alienation" includes any testamentary disposition of property.

"Appointment of an heir" includes any adoption made or purporting to be made according to custom.

Savings. 4. This Act shall not affect any suit pending in any Court on the date on which this Act comes into force.

5. Subject to the provisions contained in Sections 4 to 25 (inclusive), of the Indian Limitation Act, 1908, and notwithstanding anything to the contrary contained in the first schedule of the said Act, every suit, of any description specified in the schedule annexed to this Act, instituted after the period of limitation prescribed therefor in the schedule shall be dismissed, although limitation has not been set up as a defence.

6. Notwithstanding anything herein contained, any suit for which period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, or by the Punjab Limitation (Ancestral Land Alienation) Act, 1900, may be instituted within the period of one year next after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, or by the Punjab Limitation (Ancestral Land Alienation) Act, 1900, whichever period expires first.

Limitation on suits for possession where no declaratory decree has been obtained.

7. Subject to the provisions of Section 6 —

(a) No suit for the possession of ancestral immovable property on the ground that an alienation of such property or the appointment of an heir is not binding on the plaintiff according to custom shall lie if a suit for the declaration that the alienation or appointment of an heir is not so binding would be time-barred, unless a suit for such a declaration has been instituted within the period prescribed by the schedule.

(b) No suit for the possession of ancestral immovable property by a plaintiff on the ground that he is as heir appointed in accordance with custom entitled thereto shall lie if a suit for a declaration that his alleged appointment as heir was validly made according to custom would be time-barred, unless a suit for such declaration has been instituted within the period prescribed by the schedule.

8. When any person obtains a decree declaring that an alienation of ancestral immovable property or the appointment of an heir is not binding on him according to custom, the decree shall enure for the benefit of all persons entitled to impeach the alienation or the appointment of an heir.

SCHEDULE.

Description of suit.	Period of Limitation.	Time from which period begins to run.
1. A suit for a declaration that an alienation of ancestral immovable property will not, according to custom, be binding on the plaintiff after the death of the alienor or (if the alienor is a female) after her death or forfeiture of her interest in the property.	Six years .	<p><i>Firstly</i>:—If the alienation is by a registered deed, the date of registration of such deed.</p> <p><i>Secondly</i>:—If the alienation is not by a registered deed—</p> <p>(a) if an entry regarding the alienation in the Register of Mutations has been attested by a Revenue officer under the Punjab Land Revenue Act, 1887, the date on which the entry is attested;</p> <p>(b) If such entry has not been attested, the date on which the alienee takes physical possession of the whole or any part of the property alienated in pursuance of such alienation;</p> <p>(c) in all other cases, the date on which the alienation comes to the knowledge of the plaintiff.</p>
2. A suit for possession of ancestral immovable property which has been alienated on the ground that the alienation is not binding on the plaintiff according to custom —		

Description of suit.	Period of Limitation.	Time from which period begins to run.
(a) if no declaratory decree of the nature referred to in Article 1 is obtained	Six years	As above.
(b) if such declaratory decree is obtained.	Three years	The date on which the right to sue accrues, or the date on which the declaratory decree is obtained, whichever is later.
3. A suit for a declaration that an alleged appointment of an heir is invalid as being opposed to custom or in fact never took place.	Six years	The date on which the alleged appointment of an heir becomes known to the plaintiff.
4. A suit for possession of ancestral immovable property on the ground that an appointment of an heir is invalid or never in fact took place—		
(a) if no declaratory decree of the nature referred to in Article 3 is obtained;	Six years	The date on which the alleged appointment of an heir becomes known to the plaintiff.
(b) if such declaratory decree is obtained.	Three years	The date on which the right to sue accrues, or the date on which the declaratory decree is obtained, whichever is later.
5. A suit for a declaration that an alleged appointment of an heir was validly made according to custom.	Six years	The date when the rights of the alleged appointed heir are interfered with.
6. A suit for possession of ancestral immovable property by a plaintiff on the ground that he is an heir appointed in accordance with custom entitled thereto—		
(a) if no declaratory decree of the nature referred to in Article 5 is obtained;	Six years	The date when his rights as such heir are interfered with.
(b) if such declaratory decree is obtained.	Three years	The date of the death of the person making the appointment or (if such person is a female) of her death or of the forfeiture of her interest in the property or the date on which the declaratory decree is obtained, whichever is later.

THE INDIAN LIMITATION ACT, IX OF 1908

VOLUME III

ARTICLES 141 TO 183 WITH SYNOPSES IN PARALLEL COLUMNS

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PART VIII — TWELVE YEARS—(*Continued*)

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— Twelve years. —
When the female dies.

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— Twelve years. —
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143. Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.

— Twelve years. —

When the forfeiture is incurred or the condition is broken.

144. For possession of immoveable property or any interest therein not hereby otherwise specially provided for.

— Twelve years. —

When the possession of the defendant becomes adverse to the plaintiff.

PART IX — THIRTY YEARS

145. Against a depositary or pawnee to recover moveable property deposited or pawned.

— Thirty years. —

The date of the deposit or pawn.

146. Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged

— Thirty years. —

When any part of the principal or interest was last paid on account of the mortgage-debt.

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— Thirty years. —

The date of the dispossession or discontinuance.

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147. By a mortgagee for foreclosure or sale.

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148. Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.

— Sixty years. —

When the right to redeem or to recover possession accrues :

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149. Any suit by or on behalf of the Secretary of State for India in Council, the Secretary of State, the Crown Representative, the Central Government or any Provincial Government, except a suit before a Federal Court in the exercise of its original jurisdiction

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— Seven days. —

The date of the sentence.

150A. Under the Code of Criminal Procedure, 1898, from a finding rejecting a claim under section 443 of that Code.

— Seven days. —

The date of the finding.

151. From a decree or order of any of the High Courts of Judicature at Fort William, Madras, Bombay and Lahore in the exercise of its original jurisdiction.

— Twenty days. —

The date of the decree or order.

152. Under the Code of Civil Procedure, 1908, to the Court of a District Judge.

— Thirty days —

The date of the decree or order appealed from.

153. Under the same Code to a High Court from an order of a Subordinate Court refusing leave to appeal to His Majesty in Council.

— Thirty days —

The date of the order.

154. Under the Code of Criminal Procedure, 1898, to any Court other than a High Court.

— Thirty days. —

The date of the sentence or order appealed from.

155. Under the same Code to a High Court, except in the cases provided for by Article 150 and Article 157

— Sixty days. —

The date of the sentence or order appealed from.

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1. Legislative changes : p. 2283
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1. Legislative changes : p. 2284
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156. Under the Code of Civil Procedure, 1908, to a High Court, except in the cases provided for by Article 151 and Article 153.

— Ninety days —

The date of the decree or order appealed from

157. Under the Code of Criminal Procedure, 1898, from an order of acquittal.

— Six months. —

The date of the order appealed from.

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158. Under the Code of Civil Procedure, 1908, to set aside an award.

— Ten days. —

When the award is filed in Court and notice of the filing has been given to the parties.

159. For leave to appear and defend a suit under the summary procedure referred to in Section 128 (2) (f) or under Order 37 of the same Code

— Ten days —

When the summons is served

160. For an order under the same Code, to restore to the file an application for review rejected in consequence of the failure of the applicant to appear when the application was called on for hearing

— Fifteen days —

When the application for review is rejected.

161. For a review of judgment by a Provincial Court of Small Causes or by a Court invested with the jurisdiction of a Provincial Court of Small Causes when exercising that jurisdiction

— Fifteen days. —

The date of the decree or order.

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1. Legislative changes . p. 2312
2. Court of Small Causes : p. 2312
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162. For a review of judgment by any of the following Courts, namely, the High Courts of Judicature at Fort William, Madras, Bombay, Lahore, and Nagpur and the Chief Court of Sind in the exercise of its original jurisdiction.

— Twenty days. —

The date of the decree or order.

163. By a plaintiff for an order to set aside a dismissal for default of appearance or for failure to pay costs of service of process or to furnish security for costs.

— Thirty days. —

The date of the dismissal.

164. By a defendant, for an order to set aside a decree passed *ex parte*.

— Thirty days. —

The date of the decree, or where the summons was not duly served, when the applicant has knowledge of the decree.

165. Under the Code of Civil Procedure, 1908, by a person dispossessed of immoveable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.

— Thirty days. —

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4. "Defendant," if includes his legal representative : p. 2326
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Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all.

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Limitation in

183. To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council.

— Twelve years. —

When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right :

Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be.

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— expiring on holiday—
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—Capacity to give discharge

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 (b) Capacity of one joint executor to give discharge on behalf of
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—Petition for dissolution of marriage—Delay in presenting or prosecuting petition

(a) Objection on ground of delay will not hold good where marriage is *ab initio* void S 29 N 7

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Document

—Cancellation of

(a) Right of—Basis of A 91 N 3

(b) Suit for

(i) Based upon document—Limitation A 91 N 3

(ii) Based upon document which plaintiff attacks as invalid and illegal A 91 N 3

(iii) By third party to instrument—Limitation A 91 N 3

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(vi) Whether necessary before reversioner can claim relief which he wants A 91 N 4

(c) When is a person entitled to cancel a document A 91 N 3

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—Document issued

(a) Forgery of—Declaration of—Suit for—Limitation—Starting point A 93 N 4

(b) What is A 93 N 3

—Forged document

(a) Suit for substantial relief in respect of—Limitation ... A 92, A 93 N 3

(b) Suit to declare forgery

(i) Attempt to enforce document against third party—Whether Art. 93 applies A 93 N 1

(ii) Declaration subservient or ancillary—Suit, whether one for declaration of forgery A 93 N 2

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(b) Rent due under—Suit for—Limitation A 110 N 5

(c) Royalty under, recovery of—Suit for—Limitation A 116 N 9

(d) Sale certificate granted to purchaser in court auction under provisions of Civil P. C. — Fact that copy of certificate is forwarded to registering officer and duly filed, whether makes certificate a registered document A 10 N 11

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(a) Right of—Basis of A 91 N 2

(b) Suit for

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- (k) Final decree in mortgage suit set aside in appeal against some defendants—Case ordered to be retried—Court striking off execution application against other defendants until liability of former defendants was finally settled—Order, if operates as stay of execution ... S 15 N 13
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- (i) Absolute stay rendering decree-holder incapable of taking out any execution of the decree is contemplated by S. 15 ... S 15 N 9
- (ii) Execution consigned to record room—No order granting stay or giving time made—Whether amounts to stay of execution ... S 15 N 10
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- (u) Only period during which person is actually interdicted by injunction or order will be excluded ...
- (v) Order allowing execution on condition of security being furnished—Furnishing of security found impossible—Order operates as stay of execution ...
- (w) Order allowing execution only on condition—Order, if operates as stay of execution ...
- (x) Order of attachment prohibiting execution by anybody or accompanied by stay order—S 15, if applies ..
- (y) Period of pendency of appeal from decree—Whether can be excluded in computing limitation for application for execution of decree ...
- (z) Preferring of appeal, if amounts to order granting injunction or stay ...
- (z¹) Principle of S. 15 ...
- (z²) Revival of pending application—S. 15, if affects right to apply for revival ...
- (z³) Several interrupted periods of interdiction—Party cannot exclude time during which no stay or injunction is in force :
- (z⁴) Stay by agreement of parties—S 15 does not apply ...
- (z⁵) Stay by injunction or order
 - (i) Acceptance of a decree by Court as security for costs—Whether amounts to order staying execution of such decrees ...
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Liquidator

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- (c) Limitation A 146A
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- Price of—Suit for
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—By each party to the other—Account consisting of—Balance due on—Suit on—Limitation	A 85 N 10
—Interest on, whether loan	A 59 N 4
—Necessary parties to	A 59 N 3
(a) Same person acting as agent to two principals and using money of one for benefit of another—Whether gives rise to loan	A 59 N 3
—Recovery of—Suit for, against debtor personally—Limitation	A 120 N 41; A 57 N 4

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(b) For possession of Crown lands entrusted to local authority for management—Limitation applicable, whether same as applicable to suit by local authority for possession of road...	A 116 N 4

Local authority—Suit by, for possession of road or street—(Contd.)

- (c) Limitation A 146A
- (d) Right of municipality, if extinguished by virtue of S. 28, if suit for possession is barred under Art. 146A ... A 146A N 6
- (e) Road, whether must be formed by local authority on lands belonging to or acquired by it in proprietary right for applicability of Art. 146A to such suit ... A 146A N 4
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—What is — Local Government, whether local authority within Art. 146A A 146A N 3

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- Price of—Suit for
 - (a) Limitation—Starting point A 9, A 9 N 2
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—Section 179—Suit for declaration of plaintiff's right upon entry made in Record of Rights

- (a) Denial by defendant of plaintiff's title before date of entry to plaintiff's knowledge—Whether bars plaintiff's suit for declaration of right A 120 N 50
- (b) Limitation—Starting point A 120 N 50

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- Suit by Mahomedan entitled to possession on death of Mahomedan female
 - (a) Cause of action—When accrues A 141 N 2
 - (b) Essentials of applicability of Art. 141 A 141 N 2
 - (c) Limitation—Starting point A 141, A 141 N 2
- Suit for share of wife's property in possession of another sharer
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| (ix) Person not bound by order, whether must bring such suit within limitation prescribed by Art 47 | A 47 N 3 |
| (x) Person's right to property, whether extinguished by his failure to sue within limitation under Art. 47 if his possession has not been disturbed by order | A 47 N 10 |
| (xi) Person's right to property, whether extinguished by virtue of S. 28 by failure to bring such suit within three years under Art. 47 | A 47 N 10 |
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| — <i>Actio personalis moritur cum persona</i> (A personal right of action dies with the person) | | S 9 C 18 N 2 |
| — <i>Actus curiae neminem gravabit</i> (An act of the Court shall prejudice no man) | .. .. . | S 4 N 2, S 5 N 22, A 166 N 7, A 182 N 25 |
| — <i>Certum est quod certum reddi potest</i> (That is certain which can be rendered certain) | ... .. . | A 113 N 7 |
| — <i>Cessante ratione legis cessante lex</i> (The reason of the law ceasing, the law itself ceases) | ... .. . | S 12 N 7 |
| — <i>Contra non valentem agere nulla currit praescriptio</i> (Prescription does not run against a party under disability or who is unable to act) | | A 141 N 2 |

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- Expressum facit cessare tacitum* (What is expressed makes what is silent to cease) A 149 N 3
- Generalia specialibus non derogant* (General words do not derogate from special) S 14 N 8; S 29 N 3; A 2 N 3; A 61 N 2
- Ignorantia juris hand excusat* (Ignorance of law does not excuse): A 96 N 3
- Ignorantia legis neminem excusat* (Ignorance of law excuses no one) A 96 N 3
- Interest reipublice ut sit finis litium* (It concerns the State that there be an end to law suits) S 23 N 7
- Lex no cogit ad impossibilia* (The law forces not to impossibilities) S 4 N 2
- Nec vi nec clam nec precario* (Neither by force nor clandestinely nor by permission, i. e. peaceably, openly and as of right) ... S 26 N 3
- Nulleim tempus aut occurrit regi* (No time or place affects the King or the rights of the Crown) A 149 N 3
- Qui sentit commodum sentire debet et onus* (He who receives the advantage ought to suffer the burden) A 99 N 3
- Sic uteri tuo ut alienum non laedas* (Use your own property in such a manner as not to injure that of another) S 2 Cl 5 N 1
- 'Tantum prescriptum quantum possessum'* A 142 & 144 N 53

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- Ascertainment of
 - (a) Application for
 - (i) Limitation A 181 N 17
 - (ii) Not an application for execution A 183 N 14
 - (b) Application for, after award of such profits — Limitation — Starting point A 109 N 11
 - (c) Application for, in Madras High Court—Limitation A 181 N 17
 - (d) Claim for ascertainment, whether limited to profits within three years before date of application A 109 N 11
- Claim for
 - (a) Asked in suit for recovery of possession — How far maintainable A 109 N 10
 - (b) Claim not put forth in suit for recovery of possession in first instance—Subsequent amendment by prayer—Effect of A 109 N 10
- Future mesne profits
 - (a) Decree silent as to period for which it can be claimed—Claim for such profits after three years of decree — Applicant referred to fresh suit — Limitation applicable for such suit A 109 N 11
 - (b) Period for which such profits can be granted A 109 N 11
- Suit for
 - (a) Against person in wrongful possession of property — Order staying delivery of possession to court auction purchaser of same property purchased by him — Whether amounts to injunction preventing institution of suit S 15 N 6
 - (b) Cause of action, if suspended by institution by plaintiff of a suit for possession S 9 N 11
 - (c) Discharge—Manager of joint Hindu family—Capacity of, to give discharge S 7 N 16
 - (d) For period between date of institution of suit and date of obtaining ejectment decree against defendant — Defendant

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(e) Mesne profits wrongfully received by defendant—Limitation:

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(f) Period during which prior suit by plaintiff for possession was pending—Whether can be excluded in computing period of limitation

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(g) Profits *pendente lite* and also future mesne profits from date of decree up to delivery of possession not granted by Court—Subsequent suit for such profits, if barred — Limitation :

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—Acknowledgment by minor—Whether available against him ...

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—Acknowledgment or payment by *de facto* guardian of minor who is not his legal guardian—Whether binding on minor under S. 21:

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S 21 N 3

—Acknowledgment or payment by guardian of minor on his behalf—Whether binding on minor

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—Acknowledgment or payment by guardian of minor — Whether effective irrespective of the question of its being for minor's benefit

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—Acknowledgment or payment by lawful guardian — Natural guardian of minor, if lawful guardian

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—Age of majority

(a) Capacity to act in matters of marriage, dower, divorce and adoption—Majority, when attained

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(b) Guardian appointed for person or property of minor or Court of Wards assuming superintendence over his property—Age of majority, when attained

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(a) Suit for possession of property alienated after attaining majority—Limitation

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- Expressum facit cessare tacitum* (What is expressed makes what is silent to cease) ... A 149 N 3
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- (b) Application for, after award of such profits — Limitation — Starting point ... A 109 N 11
- (c) Application for, in Madras High Court—Limitation ... A 181 N 17
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- Claim for
- (a) Asked in suit for recovery of possession — How far maintainable ... A 109 N 10
- (b) Claim not put forth in suit for recovery of possession in first instance—Subsequent amendment by prayer—Effect of ... A 109 N 10
- Future mesne profits
- (a) Decree silent as to period for which it can be claimed—Claim for such profits after three years of decree — Applicant referred to fresh suit — Limitation applicable for such suit ... A 109 N 11
- (b) Period for which such profits can be granted ... A 109 N 11
- Suit for
- (a) Against person in wrongful possession of property — Order staying delivery of possession to court auction purchaser of same property purchased by him — Whether amounts to injunction preventing institution of suit ... S 15 N 6
- (b) Cause of action, if suspended by institution by plaintiff of a suit for possession ... S 9 N 11
- (c) Discharge—Manager of joint Hindu family—Capacity of, to give discharge ... S 7 N 16
- (d) For period between date of institution of suit and date of obtaining ejectment decree against defendant — Defendant

Minor—(Contd.)

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 - Suit against—Minor wrongly described as major and impleaded as defendant—Subsequent discovery of mistake and appointment of guardian—Minor is a party from the very beginning notwithstanding the defect of non-representation S 22 N 8
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 - (a) After attaining majority, for profits of immovable property received by defendant—Limitation—S. 6, Limitation Act, whether applies A 109 N 9
 - (b) Against guardian for specific sums received by guardian during plaintiff's minority—Limitation A 120 N 2
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 - (d) For impeaching alienation by limited female owner—Right of minor to bring such suit under Punjab Customary Law where major reversioners omit to sue within period of limitation A 125 N 7
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 - (j) Minor suing as major by *bona fide* mistake
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- Effect of—Minority, if negatives knowledge S 6 N 26
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 - (a) Cause of action different—Hindu widow succeeded by minor reversioner—Suit for possession—Extension, if available S 6 N 14
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| (vi) Art. 132 and special or local law for such suits, applicability of | ... | ... | ... | A 132 N 2 |
| (vii) By Hindu widow for arrears of maintenance | ... | ... | ... | A 132 N 8 |
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| (xv) Suit for payment of interest charged upon mortgaged property—Limitation | ... | ... | ... | A 132 N 12 |
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| (xviii) Suit to recover <i>kattubadi</i> —Limitation | ... | ... | ... | A 132 N 8 |
| (xix) Suit to recover money due on mortgage by deposit of title deeds—Limitation | ... | ... | ... | A 132 N 22 |
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| (e) Suit for foreclosure—Suit, whether one to enforce payment of money charged upon immovable property | ... | ... | ... | A 132 N 3 |
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Money—Charged upon immovable property—Suit for payment of— What is—

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(h) Suit for sale—Whether one to enforce payment charged upon immovable property ..	A 132 N 3
(i) Suit for share of mortgage money received by co-owner of property who has mortgaged the same and received the mortgage money ...	A 132 N 8
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(a) Deposit, whether must be under agreement that it shall be payable on demand for applicability of Art. 60 ...	A 60 N 7
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(ii) Limitation—Starting point	A 60 N 10
(iii) Limitation, where money is deposited under agreement that it shall be payable on demand	A 60
(iv) Money deposited as earnest money for purchase of property—Limitation	A 60 N 7
(v) Money deposited as security for due performance of certain act—Limitation	A 60 N 7
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(vii) Money deposited on terms that depositor should return equivalent sum to depositor—Limitation ...	A 62 N 17
(viii) Money deposited with Nattukottai Chetties on <i>thavanai</i> system—Limitation	A 60 N 7
(ix) Money kept in deposit with a particular person — Limitation	A 62 N 31
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(b) "Demand" by whom should be made, to start time running	A 60 N 9
(c) 'Demand' what is, to start time running under Art. 60	A 60 N 8
(xiii) With banker—Suit for—Limitation	A 60 N 3
—Due under statutory liability—Suit for—Limitation ...	A 120 N 43
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Money—Charged upon immovable property—Suit for payment of—(Contd.)

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|---------|--|---------|-----|------------|
| (vi) | Art. 132 and special or local law for such suits, applicability of | ... | ... | A 132 N 2 |
| (vii) | By Hindu widow for arrears of maintenance | ... | ... | ... | A 132 N 8 |
| (viii) | By principal to enforce charge on immovable property created to secure moneys which might be found due from agent on taking accounts | ... | ... | A 132 N 3 |
|  | ... | ... | ... | A 132 N 4 |
| | | ... | ... | A 132 N 26 |
| | | ... | ... | A 132 N 8 |
| | | becomes | | |
| | due" | ... | ... | A 132 N 23 |
| (xiii) | Limitation | ... | ... | ... |
| | (a) Mortgagee, whether gets fresh cause of action where conveyance of portion of mortgaged property in discharge of claim under mortgage turns out to be inoperative | ... | ... | ... | A 132 N 25 |
| | (b) Starting point—Where mortgage is for term certain with default clause | ... | ... | ... | A 132 N 24 |
| | (c) Time, whether suspended by mortgaged property becoming submerged under water | ... | ... | ... | A 132 N 25 |
| (xiv) | Suit comprising both claim to enforce charge upon immovable property and claim to enforce personal covenant in mortgaged document—Limitation | ... | ... | ... | A 132 N 2 |
| (xv) | Suit for payment of interest charged upon mortgaged property—Limitation | ... | ... | ... | A 132 N 12 |
| (xvi) | Suit to enforce payment of money charged by document on immovable property—Limitation | ... | ... | ... | A 132 N 8 |
| (xvii) | Suit to enforce vendor's lien—Limitation | ... | ... | ... | A 132 N 7 |
| (xviii) | Suit to recover <i>kattubadi</i> —Limitation | ... | ... | ... | A 132 N 8 |
| (xix) | Suit to recover money due on mortgage by deposit of title deeds—Limitation | ... | ... | ... | A 132 N 22 |
| (xx) | Subsequent suit against person interested not made party to prior mortgage suit—Limitation | ... | ... | ... | A 132 N 16 |
| (xxi) | What is | | | |
| | (a) Suit by Hindu widow for recovery of money which she expended in discharge of her husband's debt | ... | ... | ... | A 132 N 8 |
| | (b) Suit by mortgagee against third person who has received money due to mortgagee from mortgagor | ... | ... | ... | A 132 N 11 |
| | (c) Suit by one co-sharer in vatan against another co-sharer who has received improperly plaintiff's share of <i>haqq</i> s | ... | ... | ... | A 132 N 20 |
| | (d) Suit by vendee of property for recovery of moneys paid by him as per directions in sale deed on such sale deed being set aside | ... | ... | ... | A 132 N 8 |
| | (e) Suit for foreclosure—Suit, whether one to enforce payment of money charged upon immovable property | ... | ... | ... | A 132 N 3 |
| | (f) Suit for money paid by trustee out of his own pocket for purposes of trust | ... | ... | A 132 N 8 |

Money—Charged upon immovable property—Suit for payment of— What is—
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- (g) Suit for redemption—Whether one to enforce payment of money charged upon immovable property A 132 N 3
- (h) Suit for sale—Whether one to enforce payment charged upon immovable property A 132 N 3
- (i) Suit for share of mortgage money received by co-owner of property who has mortgaged the same and received the mortgage money A 132 N 8

—Collected by defendant as subscription A 62 N 7

—Deposited

(a) Deposit, whether must be under agreement that it shall be payable on demand for applicability of Art. 60 A 60 N 7

(b) On terms that depositee should return equivalent sum to depositor—Limitation A 62 N 17

(c) Suit for

(i) Against person who has placed himself in position of banker with regard to particular person—Limitation : A 60 N 6

(ii) Limitation—Starting point A 60 N 10

(iii) Limitation, where money is deposited under agreement that it shall be payable on demand A 60

(iv) Money deposited as earnest money for purchase of property—Limitation A 60 N 7

(v) Money deposited as security for due performance of certain act—Limitation A 60 N 7

(vi) Money deposited in Court in *usum jus habentis* and withdrawn by person not entitled to it—Suit for such money—Limitation A 62 N 31 FN 1

(vii) Money deposited on terms that depositee should return equivalent sum to depositor—Limitation A 62 N 17

(viii) Money deposited with Nattukottai Chetties on *thavanai* system—Limitation A 60 N 7

(ix) Money kept in deposit with a particular person — Limitation A 62 N 31

(x) Money payable at specified time but contract between parties showing that after period so fixed, deposit is to be regarded as payable on demand—Limitation A 60 N 7

(xi) Scope of Art. 60 A 60 N 6

(xii) When demand is made

(a) "Demand" by Nattukottai Chetty husband in whose name wife's Stridhan is deposited in a firm, whether demand binding on wife so as to start time running A 60 N 9

(b) "Demand" by whom should be made, to start time running A 60 N 9

(c) 'Demand' what is, to start time running under Art. 60 A 60 N 8

(xiii) With banker—Suit for—Limitation A 60 N 3

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—Government securities, whether money, within Art. 57 A 57 N 6

—Grain, whether money A 57 N 6

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—Had and received

- (a) Money received by defendant for plaintiff's use at the time of receipt—What is—Illustrative cases ... A 62 N 7
- (b) Privity of contract—Whether necessary to constitute receipt of money by defendant—Receipt for plaintiff's use—Indian law ... A 62 N 2
- (c) Suit for
 - (i) Against benamidar, receiving money belonging to real owner—Limitation ... A 62 N 24
 - (ii) Against trustee—Suit for account of trust property and recovery of dues—Limitation ... A 62 N 4
 - (iii) Based on allegation that defendant ought to have received certain sum of money on plaintiff's behalf—Limitation ... A 62 N 6
 - (iv) By auction purchaser for refund of purchase money on sale of patni taluk for arrears of rent being set aside—Limitation ... A 62 N 20
 - (v) By consignor for surplus sale proceeds of goods sold by Railway Company under Railways Act, S. 56—Limitation ... A 62 N 31
 - (vi) By Karnavan of Malabar Tarwad for money belonging to Tarwad and received by junior member—Limitation ... A 62 N 31
 - (vii) By one cosharer against another cosharer who has received former's share of money due—Limitation : ... A 62 N 9
 - (viii) By principal against agent for balance due out of moneys received by agent after deducting all legitimate expenses and allowances—Limitation ... A 62 N 10
 - (ix) By principal against agent for money received by agent for principal under circumstances which make it agent's duty to pay over to principal immediately money is received—Limitation ... A 62 N 10
 - (x) By principal against legal representative of deceased agent for money received by deceased agent for use of principal—Limitation ... A 62 N 11
 - (xi) By real owner against benamidar for money received by latter upon mortgage bond in his name—Limitation ... A 62 N 24
 - (xii) By real owner against decree-holder for money wrongly attached in execution of decree and paid over to decree-holder—Limitation ... A 62 N 27
 - (xiii) By ward against guardian for specific sums received by latter—Limitation ... A 62 N 25
 - (xiv) Defendant drawing money invested by him in bank and which belonged to deceased lady—Suit for recovery of money by plaintiff who is heir-at-law—Limitation ... A 62 N 31
 - (xv) Essential conditions for applicability of Art. 62 ... A 62 N 2
 - (xvi) For arrears of rent realized by person not entitled to it—Limitation ... A 110 N 3
 - (xvii) For haqq-i-chaharam—Limitation ... A 62 N 30
 - (xviii) For money received by defendant for use of plaintiff's predecessor-in-interest—Limitation ... A 62 N 8

Money—Had and received—Suit for—(Contd.)

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- realized—Limitation A 120 N 3
- (xxi) For rent received by defendant in kind A 62 N 6
- (xxii) For specific sums received by guardian during plaintiff's minority—Limitation A 120 N 2
- (xxiii) For sums due to plaintiff out of collections from village A 62 N 31
- (xxiv) Illustrative cases of, governed by Art. 62 A 62 N 31
- (xxv) Judgment-debtor paying certain sums under decree to decree-holder — Application by judgment-debtor for certificate of satisfaction rejected—Suit by judgment-debtor for recovery of money paid to decree-holder—Limitation applicable, whether same as applicable to suit for money had and received A 62 N 31
- (xxvi) Land purchased by A — Sale of land for arrears of revenue — Surplus sale proceeds paid to B, original owner—Suit by A against B for surplus sale proceeds —Limitation applicable, whether same as applicable to suit for money had and received A 62 N 21
- (xxvii) Limitation A 62; A 62 N 2
- (a) Art. 62 applies whether liability of defendant arises under statute or under general principles of law A 62 N 2
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- (c) Illustrative cases governed by residuary Art 120. A 120 N 14
- (d) Starting point A 62 N 32
- (xxviii) Money, whether must have been received for plaintiff's use at the time of receipt for applicability of Art. 62 A 62 N 7
- (xxix) Nature of, under English Law A 62 N 2
- (xxx) Partition of joint Hindu family — Karta assigning to member a mortgage bond already paid off — Suit by member against ex-karta for recovery of money — Limitation A 62 N 7
- (xxxi) Payment of premium by tenant to landlord — Such premium prohibited by Bombay Rent Act—Claim for refund of premium paid—Limitation A 120 N 2
- (xxxii) Plaintiff entitled to receive under terms of a will, certain amount as maintenance from income of certain properties in hands of defendant—Limitation A 62 N 16
- (xxxiii) Plaintiff entitled to sue either for money had and received or for some other relief to which shorter period of limitation is applicable—Plaintiff, whether can be compelled to sue for relief to which shorter period of limitation is applicable A 62 N 2
- (xxxiv) Succession certificate obtained by brother of deceased —Money realized — Suit by widow of deceased for recovery of money—Limitation A 62 N 9

Money—Had and received—Suit for—(Contd.)

(xxxv) Sum of money due from <i>A</i> to <i>B</i> — <i>C</i> receives money in circumstances rendering such receipt one for use of <i>B</i> —Suit by <i>B</i> against <i>C</i> for money had and received, whether barred if suit for recovery by <i>B</i> against <i>A</i> is barred by limitation ...	A 62 N 2
(xxxvi) Time, whether extended by operation of S. 18 ...	A 62 N 32
(xxxvii) To recover from defendant, as son and legal representative of plaintiff's late pleader money, received by latter for payment to plaintiff—Limitation ...	A 62 N 6
(xxxviii) Whether one in nature of suit for damages or compensation ...	A 62 N 2
(d) Test to determine whether money is received for plaintiff's use ...	A 62 N 2
(e) What is ...	A 62 N 6
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(ii) Money had and received by defendant's predecessor-in-interest, whether money had and received by defendant ...	A 62 N 6
(iii) Money paid by plaintiff to defendant under void agreement, whether money had and received ...	A 62 N 2
(iv) Money received by defendant's agent, whether money had and received by defendant ...	A 62 N 6
(v) Money which defendant compelled plaintiff to pay and to which defendant is not entitled ...	A 62 N 2
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(i) Arts. 57 and 59, distinguished ...	A 57 N 1
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(iv) Where lender draws his own cheque and gives it to borrower ...	A 58 N 1
(v) Where lender transfers to borrower cheque drawn by another person and endorsed in his favour by payee ...	A 58 N 1
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(c) Stipulation to pay interest, whether makes difference in applicability of Art. 59 ...	A 59 N 7
(d) Where loan is on agreement that it is repayable on future date—Limitation ...	A 57 N 5; A 51 N 2
—Meaning of ...	
—Obtained by defendant from third party who had obtained it by fraud practised upon plaintiff ...	A 62 N 15
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(as) General and special provisions of limitation ...	A 51 N 1

Money—Paid by plaintiff for defendant—(Contd.)

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|--|--------|-----------|
| (a) Money paid to third person for defendant — When recoverable from defendant under substantive law | ... | A 61 N 5 |
| (b) Question under what circumstances money paid for defendant can be recovered by plaintiff, is one of substantive law | ... .. | A 61 N 2 |
| (c) Question whether payment to third person was for defendant is one of fact | | A 61 N 5 |
| (d) Suit for | | |
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| (ii) A taking over B's liability and subsequently paying it— Suit by A against B for reimbursement—Limitation | ... | A 61 N 9 |
| (iii) By person interested in property, paying off charge liable to be paid by defendant—Limitation | .. | A 61 N 7 |
| (iv) By receiver to recover money spent for estate | ... | A 61 N 14 |
| (v) By succeeding trustee of temple against previous trustee for recovery of sum taken by latter for litigation purposes during trusteeship—Limitation | . | A 61 N 3 |
| (vi) Paid for defendant and creating money charge on property | ... .. | A 61 N 17 |
| (vii) For reimbursement for fine paid by plaintiff for misuse of land by defendant | ... .. | A 61 N 13 |
| (viii) Limitation | ... .. | A 61 |
| (a) Applicability of general Art. 61 where any special Article applies to the case | .. | A 61 N 2 |
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| (z) Where plaintiff has made several payments to meet a particular liability of defendant | | A 61 N 18 |
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| (x) Where defendant has contracted to pay the money to plaintiff | | A 61 N 5 |
| (xi) Where money has been deposited into Court for purpose of being paid to defendant | .. | A 61 N 4 |
| (xii) Where money is paid for defendant by third person against plaintiff's will | ... .. | A 61 N 3 |
| (xiii) Where plaintiff, being interested in such payment, has paid it for defendant | .. | A 61 N 5 |
| (xiv) Where plaintiff has been forced to make involuntary payment | ... .. | A 61 N 3 |
| (xv) Where plaintiff has made the payment for defendant not intending to do so gratuitously and defendant has enjoyed benefit thereof | | A 61 N 5 |
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Money—Paid by plaintiff for defendant—(Contd.)

(e) What is

- (i) *A*, in possession of property adjudged to him by competent Court pays off charge on property—*B* subsequently decided on appeal to be owner of property—Payment by *A*, whether payment for *B* within Art. 61 ... A 61 N 5
- (ii) Allegation by *A* that he is lawful heir to deceased person—Payment by *A* of deceased person's debts—*B* subsequently found to be true heir—Payment by *A*, whether payment for *B* within Art. 61 ... A 61 N 5
- (iii) Mere fact that defendant or his property is liable to pay to third person on date on which plaintiff pays to such third person, whether necessarily shows that payment was for defendant ... A 61 N 5
- (iv) Money paid by agent for liabilities incurred for principal, whether money paid for defendant within Art. 61: ... A 61 N 15
- (v) Money paid to third person to whom defendant is not liable, whether money paid for defendant ... A 61 N 5
- (vi) Money spent by receiver for purposes of estate, whether money paid for defendant within Art. 61 ... A 61 N 14
- (vii) Payment by one co-partner of common liability, whether payment for other co-partners within Art. 61 ... A 61 N 6
- (viii) Payment by one of two joint owners of tenure to save estate from sale for arrears of revenue and rent, whether payment for other joint owner ... A 61 N 6
- (ix) Payment in excess of his share by one of several persons jointly liable, whether payment for other persons liable ... A 61 N 6
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- Paid for joint purchase—Recovery of—Suit for—Limitation ... A 89 N 3
- Paid in consideration of voidable transfer without possession—
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- (b) Consideration which afterwards fails
 - (i) Illustrative cases ... A 97 N 4
 - (ii) Meaning of ... A 97 N 4
 - (a) Whether means failure of total consideration ... A 97 N 4
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 - (i) Agreement discovered to be void, whether existing consideration ... A 97 N 11a
 - (ii) Consideration which is at the time of payment void in law, whether existing consideration ... A 97 N 3
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 - (a) What is ... A 97 N 4, 11
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- (vii) Possession given under a void promise to transfer, whether existing consideration ... A 97 N 3
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- (ix) Void transfer with delivery of possession, whether existing consideration ... A 97 N 3; A 97 N 7
- (x) Voidable transfer with possession given, whether existing consideration ... A 97 N 9
- (xi) Voidable transfer without possession, whether existing consideration ... A 97 N 8
- (e) Limitation ... A 62 N 13; A 97
 - (i) Extension of—Period, whether extended to six years in cases falling within both Art. 97 and Art. 116 ... A 97 N 2
 - (ii) Starting point ... A 97 N 5
 - (a) Money paid on void transfer with delivery of possession—Illustrative cases ... A 97 N 7
 - (b) Suit on contract which fails through Court of law refusing to enforce its specific performance ... A 97 N 11
 - (c) Suit on failure of executory consideration—Illustrative cases ... A 97 N 11
 - (d) Where Appellate Court confirms decision of first Court deciding transfer void in case of voidable transfer without possession ... A 97 N 8
 - (e) Where first Court decides transfer void and second Court reverses it which in its turn is reversed by High Court in case of voidable transfer without possession ... A 97 N 8
 - (f) Where in execution of decree by third person with paramount title against plaintiff, such third party is formally put in possession of property purchased by a plaintiff ... A 97 N 7
 - (g) Whether can be postponed by reason of the fact that decision of first Court is confirmed by Appellate Court where such decision is the failure of consideration ... A 97 N 11
- (f) Money not paid in pursuance of any contract between the parties—Suit for, whether suit within Art 97 ... A 97 N 1
- (g) Money paid
 - (i) Adjustment of mutual claim, whether payment of money ... A 97 N 2
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- (k) Right to recover such money, basis of ... A 97 N 1
- (l) Suit for, distinguished from one for damages or compensation ... A 97 N 2
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—Paid on voidable transfer without possession—Limitation—Starting point	A 97 N 8
—Paid to witness—Money paid as batta and travelling expenses—Failure of witness to attend in pursuance of summons served on him—Suit for recovery of money paid—Limitation	A 62 N 31
—Paid under agreement void <i>ab initio</i> —Limitation	A 62 N 12
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(a) Suit in respect of money paid in satisfaction of claim for arrears of revenue				
(i) Limitation				
(a) Applicability of Art. 16 and Madras Revenue Recovery Act, S. 59	A 16 N 5
(b) Applicability of Art. 16, essentials of	A 16; A 16 N 2
(c) Starting point	A 16 N 4
(ii) Under Madras Compulsory Labour Act, S. 6—Limitation	A 16 N 5
(iii) Under Madras Revenue Recovery Act, S. 52—Limitation	A 16 N 5
(b) Suit in respect of money paid on account of demands recoverable as arrears of revenue—Limitation	A 16
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—Paid upon agreement discovered to be void—Limitation—Starting point	A 97 N 11a
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(a) Meaning of	A 61 N 3
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(a) Suit for refund by auction purchaser—See Auction purchaser.				
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—Receipt of—What is				
(a) Receipt of paddy, whether receipt of money	A 62 N 6
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—What is	A 51 N 2
—Whether moveable property	A 89 N 6
—Whether moveable property within Art. 29	A 29 N 5
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—Wrongfully attached under decree and paid over to decree-holder—Suit by real owner—Limitation	A 62 N 27

Mortgage**—Acknowledgment**

- (a) By judgment-debtor in respect of mortgage on property—
Whether binding on auction-purchaser ... S 19 N 34
- (b) By mortgagor, after he has parted with his entire interest
in equity of redemption and when not personally liable—
Whether can be used against transferee of equity of
redemption as acknowledgment by person through whom
transferee derives liability ... S 19 N 25
- (c) Entry in settlement record that certain property is under a
mortgage—When can be used as acknowledgment of liabi-
lity in respect of mortgage ... S 19 N 49
- (d) Mortgagee obtaining decree for possession and delivery
thereof—Mortgagee giving receipt acknowledging that he
has received delivery of possession as directed by decree—
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with respect to mortgage so as to save limitation for suit
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- (e) Mortgagor granting mortgage with possession to stranger—
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- (w) Suit based on title—Limitation A 113 N 3
- (x) Suit based on title and suit for specific performance of contract by giving possession—Distinction between—Illustrative cases A 113 N 3
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- (a) And demand recoverable as such arrears—Distinguished ... A 12 N 8
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- (z) For declaration that defendant has fraudulently procured entry of his name in revenue records and that plaintiff alone is entitled to succeed to property—Limitation A 120 N 23
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- Of property—Possession of bailee after expiry of period for which goods were bailed to him, when becomes wrongful detention** ... A 49 N 6

Wrongful restraint

- And false imprisonment, distinction between** ... A 19 N 1
- Meaning of .** ... A 19 N 1

Wrongful seizure**—Compensation for—Suit for**

- (a) On ground of injury caused by injunction wrongfully obtained, whether one for wrongful seizure within Art. 29 ... A 29 N 7
- (b) On ground of irregular conduct of sale resulting in damages, whether one for wrongful seizure within Art. 29 ... A 29 N 7
- (c) Suit for damages on ground of fraud, whether one for wrongful seizure within Art. 29 ... A 29 N 7
- (d) Suit for recovery of amount wrongfully taken by defendant from Government treasury under legal process, whether one for compensation for wrongful seizure within Art. 29 ... A 29 N 6
- (e) Suit for specific property seized, whether one for compensation for wrongful seizure ... A 29 N 5

—Of moveable property—see under Moveable property.**—Of moveable property under legal process — Compensation for : See under Moveable property.**

- Under legal process — What is — Distraint effected by landlord under provisions of Agra Tenancy Act, whether wrongful seizure under legal process** ... A 29 N 4

- Zar-ir-chaharum—Recovery of—Suit for—Limitation** ... A 120 N 39

A. I. R. 1933 Peshawar 61 at 62.

"The law on the subject is lucidly summed up in Chitaley's Commentary on Civil Procedure Code, Vol. 1, p. 182, and is stated as follows: 'A party . . . them.'"

A. I. R. 1934 Allahabad 253 at 255.

"... the reason being that no one can have vested right in forms of procedure. The subject is discussed in Chitaley's Civil Procedure Code, Vol. 1, pp. 4 and 5."

A. I. R. 1934 Peshawar 40 at 42.

"The argument is based on Chitaley's Commentary, 1933 Edition, p. 1898 under O 21, R. 15 of the Code, which is supported by *Gopendra Krishna v. Moti Lal*, A. I. R. 1928 Cal. 559."

A. I. R. 1934 Peshawar 57 at 61.

"These conflicting views are noted on pp. 746 and 747 of Chitaley's Civil Procedure Code."

A. I. R. 1934 Peshawar 94 at 95.

"He (D. J.) quotes from Chitaley as follows: 'All co-promisees . . . as parties.'"

"I have no disagreement with this statement of the law, but in the present case the defendant is not a promisee, but a promisor. A further passage from Chitaley is cited by the learned Additional District Judge to the following effect :

'Where several . . . of suits.'

"That statement of law applies to the facts of the present case."

A. I. R. 1936 Allahabad 811 at 813.

"The ruling cases on this point are collected and noted in Chitaley's Civil Procedure Code, Vol. 3, p. 2318, 2nd Edn."

A. I. R. 1936 Nagpur 228 at 230 =

I. L. R. 1937 Nag. 230 at 234.

"The point is well summed up at pages 2469 and 2470 of Chitaley and Rao's Code of Criminal Procedure, Vol. 3, and the learned authors rightly point out that the view of the High Courts, excepting Rangoon, is consistent with the principles underlying sub-section 3 of the section."

A. I. R. 1936 Peshawar 37 at 37.

"Counsel for the appellants quotes from Chitaley's Commentary to the effect that where the question of costs has been referred to the arbitrator, or where the whole matter in dispute has been referred to the arbitrator, the arbitrator has authority to award costs in the award."

A. I. R. 1936 Peshawar 209 at 210.

"We have been referred to Note (under S. 48 in Chitaley's Commentary on the Civil Procedure Code where the distinction between a fresh application and an application in continuation of a previous application is illustrated."

A. I. R. 1937 Allahabad 82 at 87.

"The balance of authority seems to be that an Appellate Court has no power and it to interfere to the prejudice of a person who was a party to a suit, but who was not implicated in the appeal: vide "Code of Civil Procedure," Chitaley & Annaji Rao Vol. 3, pp. 3003-3004 (1st Edn). I am therefore, of opinion that defendants 2 ought not to have been implicated."

A. I. R. 1937 Calcutta 222 at 224.

"On this point there is a considerable mass of case law which will be found set out in Chitaley's Commentary on the Civil Procedure Code."

A. I. R. 1937 Lahore 41 at 49 =

I. L. R. 1937 Lah. 11 at 33.

"I find it stated in Chitaley and Annaji Rao's Code of Civil Procedure that this section (i. e., S. 80) like S. 79 enacts only a rule of procedure. With this view I agree."

A. I. R. 1937 Nagpur 50 at 53 =

I. L. R. 1937 Nag. 277 at 284.

Note and the Criminal Procedure Code. The learned authors favour the view of the Madras, Calcutta High Courts which is in accordance with the view expressed above."

I. R. 1937 Nagpur 216 at 217 =
L. R. 1938 Nag. 280 at 282.

Chitaley and Rao's Civil Procedure Edn. 2, p. 2094 under O. 22, R. 1, it asked :

in the first Court, the
either party.'

agrees with these remarks which apply to a dismissal of the suit in . It is further remarked on the city of 34 Mad loc. cit. that the appeal cannot be continued even in respect of or other relief which are merely vital to the main reliefs. I accordingly in the contention of the respondent."

I. R. 1937 Nagpur 268 at 269 =
L. R. 1937 Nag. 519 at 520.

appears that the weight of authority favours of the view that the Appellate has such powers. The dissentients that view are limited to the High Courts of Allahabad and Rangoon and the Court of Oudh : See also Chitaley and Rao's Code of Civil Procedure, Vol. I, 12."

I. R. 1937 Oudh 481 at 483 =
L. R. 13 Luck. 560 at 568 & 566.

Messrs. Chitaley and Annaji Rao in Commentary on the Code express the view that the present cl. (d) of R. 5 33 gives effect to the view taken in the Bench decision of the Allahabad Court reported in 7 All 661, and other

I. R. 1937 Peshawar 13 at 15.

In this connexion we may quote the following Note No. 4 from Mr. Chitaley's Commentary under R. 53 which is as follows : "Other decrees. — A decree this rule."

I. R. 1937 Peshawar 41 at 41.

In p. 1480 of Mr. Chitaley's Commentary on the Civil Procedure Code (1) it is noted that 'where a plaint is filed on the reopening date after the holidays and the period of limitation expired during the holidays, the fact that the ground of exemption under S. 4,

Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of the holidays.' This note is supported by reference to rulings in Nagpur, Lahore, Madras and Calcutta Courts, though a Calcutta ruling to contrary is also noted. The proposition as stated appears to me to be correct."

A. I. R. 1937 Peshawar 81 at 81.

"Learned counsel has been unable to show me any decided case in which action of that nature amounts to a public nuisance, and the commentary in Chitaley's Civil Procedure Code certainly indicates the contrary."

A. I. R. 1937 Rangoon 391 at 392.

"The learned authors of the Code of Criminal Procedure by Chitaley and Annaji Rao, Edn. 1, Vol. 1, at p. 200 say : 'Thus an ... Proviso.'

"I agree with this view."

A. I. R. 1938 Calcutta 287 at 289 & 290 =
L. L. R. (1938) 1 Cal. 53 at 58 and 60.

"In the Note to Messrs. Chitaley and Annaji Rao's Code of Civil Procedure, at p. 1388, I find the following comment : 'The first parties.'

"The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions."

A. I. R. 1938 Calcutta 730 at 733 =
I. L. R. (1939) 1 Cal. 112 at 120.

"The expression 'other cause of a like nature' has been the subject of various decisions, most of which will be found mentioned in Chitaley's Limitation Act (1938), pp. 567 to 572."

A. I. R. 1938 Lahore 220 at 222.

"(The amended Rule will be found printed at pp. 252-3 of Chitaley's Code of Civil Procedure, Edn. 2)"

A. I. R. 1938 Lahore 345 at 346.

"The learned counsel for the present respondents also quoted A. I. R. 1932 All. 446, A. I. R. 1933 All. 264 (a judgment by a Full Bench, one member of which was the present Hon'ble Chief Justice of the Lahore High Court) and the remarks in the Commentary of Mr. Chitaley's Criminal Procedure Code, Vol. 1, p. 676."

A. I. R. 1938 Nagpur 122 at 123.

"It was assumed by the Taxing Judge (Bose J.) in his order of reference that the present case was similar because he assumed that there was no difference for these purposes between a plaint and a memorandum of appeal. This we think is wrong although there are a larger number of rulings collected at p 44 of Vol. 1 of Chitaley's Civil Procedure Code which take that view."

**A. I. R. 1938 Oudh 45 at 47 and 48 =
I. L. R. 13 Luck. 689 at 693 and 695.**

"The learned counsel (for appellant) maintained that that case stands alone, and he has pointed out to us that in the Commentary on the Civil Procedure Code by Chitaley and Annaji Rao this case is submitted to have been wrongly decided: vide the Commentary, Vol. 1, (Edn. 2) p. 478, (Note 9, F. N. 4).

"In my opinion, the contention of the learned counsel for the appellant must be accepted."

**A. I. R. 1938 Oudh 146 at 147 =
I. L. R. 14 Luck. 116 at 118.**

"As has been pointed out in Chitaley's discussion of this matter in his Notes to S. 115 at pages 924 and 925 of Vol. 1, Edn. 2 of the Civil P. C., the Allahabad view originally depended on a distinction between cases in which the application had been rejected and cases where it had been accepted."

A. I. R. 1938 Peshawar 4 at 6.

"The general result of this conflict has been clearly set out in Note No. 9 of the commentary on that Rule in Chitaley's Code

of Civil Procedure and, virtually all the cases which have been referred to in the course of that Note have been cited before us as well as some other rulings in addition."

A. I. R. 1939 Lahore 356 at 357.

"As pointed out in A I R 1921 Lah 369 and A I R 1928 All 236 the absence of a shifting balance is not decisive: see also cases collected in Chitaley's Limitation Act, Vol. 2, p. 1362 *et seq.*"

A. I. R. 1939 Oudh 86 at 89.

"According to Chitaley, (Civil Procedure Code) Vol. 1, p. 517, Note 7:

'A debt debt.'"

A. I. R. 1939 Oudh 116 at 117 =**I. L. R. 14 Luck. 538 at 541.**

"A reference to the Notes to O. 40, R. 1

in the latest edition of Katju and Das's Code of Civil Procedure makes it quite clear that there is no such principle as the one suggested by learned counsel."

A. I. R. 1939 Oudh 284 at 285 =**I. L. R. 15 Luck. 19 at 23.**

"I take the following passage based on various rulings from p. 701 of Chitaley's Commentary on the Code of Criminal Procedure: 'On the making of an Section 517.'"

A. I. R. 1940 Allahabad 263 at 266.

"In Chitaley's Criminal Procedure Code, Vol. 1, p. 797, the learned commentators say: 'It is Evidence Act.' I agree with their conclusion."

A. I. R. 1940 Peshawar 24 at 25.

"At Note 10 to O. 21, R. 15 of Chitaley's Civil Procedure Code the following comments are made as regards the right of appeal against an order made under O. 21, R. 15:

'The question whether of the non applicant decree-holder.'"